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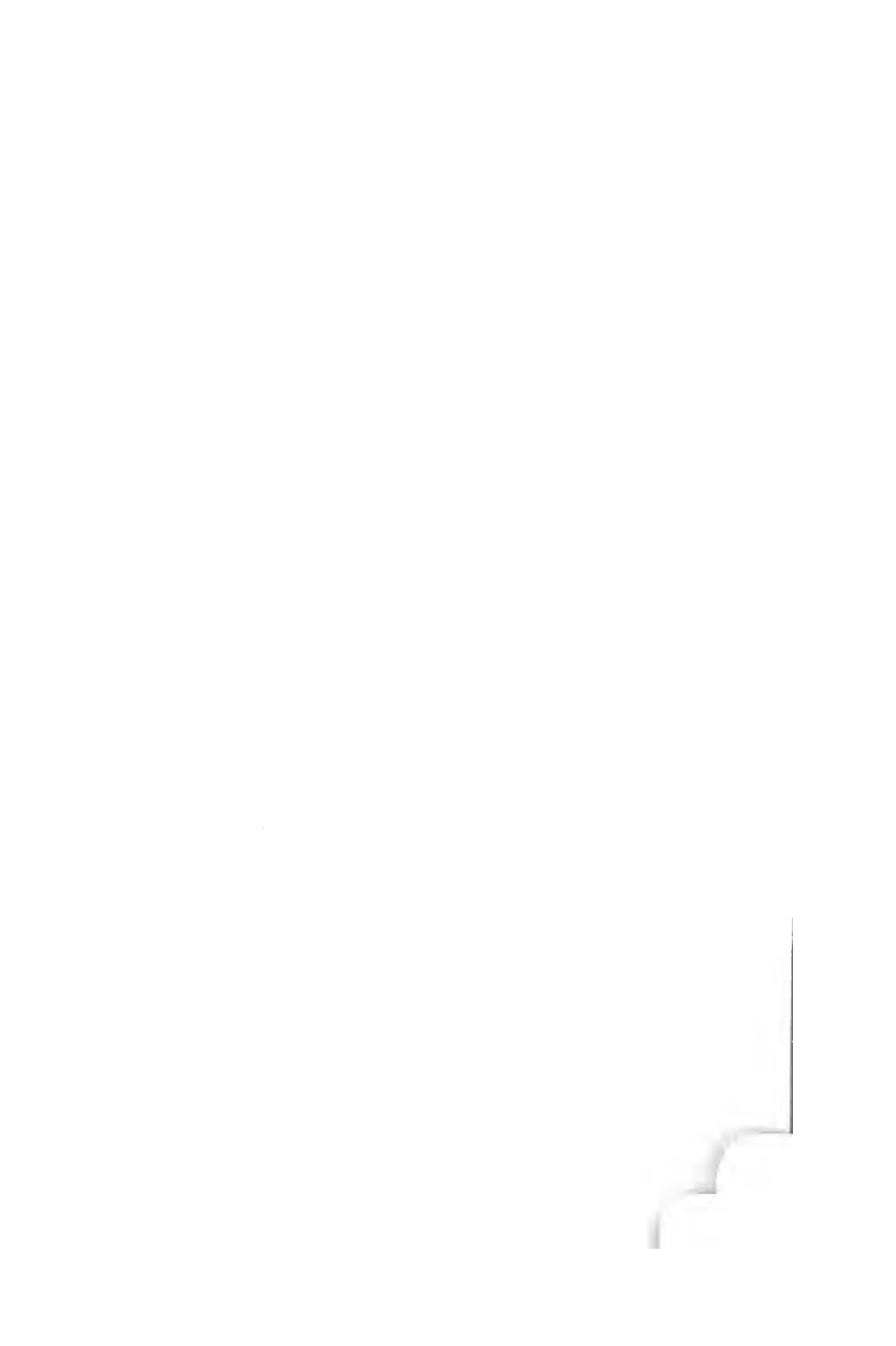
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BALLARD'S Law of Real Property

BEING

A COMPLETE COMPENDIUM OF REAL ESTATE LAW, EMBRACING ALL
CURRENT CASE LAW, CAREFULLY SELECTED, THOROUGHLY
ANNOTATED AND ACCURATELY EPITOMIZED; COMPARA-
TIVE STATUTORY CONSTRUCTION OF THE LAWS
OF THE SEVERAL STATES; AND EXHAUST-
IVE TREATISES UPON THE MOST IM-
PORTANT BRANCHES OF THE
LAW OF REAL PROPERTY

VOL. 12

EDITED BY

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EVIDENCE," SECOND EDITION, ETC., ETC.

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PREFACE

This volume contains notes of the leading real estate cases and statutes of the past two years, selected and reported in view of their importance and value to the profession.

With the aim constantly in mind of making the mass of material here contained immediately available to the busy attorney, I have altered some of the old titles which seemed unusual, leaving, however, in every case cross-references to guide one used to the old arrangement, and have in addition multiplied many times the number of cross-references inserted in the previous volumes, to bind together parts of the material which necessarily touch or overlap. It is my hope that the reader can by the use of the synopsis and the cross-references, without opening the index, find everything contained in this volume. I have also arranged the statutes here noted alphabetically by states wherever this seemed of convenience.

Cases of great interest to the profession, on all the topics treated, showing the development of the law in many novel directions, are reported. Notably in mining cases and the law relative to oil and gas, will the student find much here that is instructive. The most striking decision of the past two years, a case of tremendous public importance, is the Opinion of the Justices of the Supreme Court of Maine, reported in section 575, in which the court upholds the right of the legislature to regulate the cutting of timber on wild or uncultivated lands without compensation to the owner. The principle there laid down would seem vital to the conservation of our national resources.

The ultimate value of the volume to the profession as an accurate reflex of the law must rest on the painstaking labor of the men who gathered the material and if the work should prove of assistance to the profession theirs will be the credit. These men, to whom I am greatly indebted for their most valuable co-operation, are Elliott B. Church, R. Jackson Cram and Raymond A. Blakemore.

ARTHUR W. BLAKEMORE.

Boston, September 1, 1908.

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Of land dedicated to the public, see *post*, §63.

Of homestead, see *post*, §§241, 242.

Of irrigation rights, see *post*, §283.

Of mining claims, see *post*, §354.

Of railroad right of way, see *post*, §483.

Estoppel by disclaimer of title, see *post* Estoppel.

Sec. 1. Of real estate. Abandonment of a street for a few years not a vacation, *Central R. Co. v. Seabright*, (N. J. L. 1906) 64 Atl. 131. No abandonment where a flood drove off the occupants who planted trees on the premises two years later, *Robinson v. Nordman*, 75 Ark. 593, 88 S. W. 592.

The abandonment, by railroads, of sidings and other tracks, is regulated by Minn. Laws 1907, Ch. 261, amending Secs. 2,038-2,040 Laws 1905. Where a railroad took land in fee by a warranty deed, its title was not divested by a later abandonment for railroad purposes. The fact that the trustees under a mortgage of the railroad did not know of its existence, and paid no taxes on it, was no evidence of abandonment, *Enfield Mfg. Co. v. Ward*, 190 Mass. 314, 76 N. E. 1,053.

Where one disclaims ownership of land although holding the legal title, such disclaimer cannot divest his title, *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1,026.

ABSTRACTS AND ABSTRACTERS

See Titles.

ABUTTING OWNERS

See Highways—Special Assessments—Eminent Domain.

Liability of abutting owner for injuries caused by defective sidewalks, see *post*, §232.

Who is entitled to compensation for taking by eminent domain where a conveyance has been made, see *post*, §135.

ACKNOWLEDGMENTS

Execution and acknowledgment of deeds by corporations, see *post*, §44.

Sec. 2. Who may take. Instruments acknowledged before certain officers may be received in evidence, N. J. Laws 1906, Ch. 247. The officers who may take acknowledgments in Porto Rico, etc., are specified in N. Y. Laws 1906, Ch. 398. The officers before whom acknowledgments may be made are enumerated in So. D. Laws 1907, Ch. 3. Officers who may take acknowledgements outside the state are designated by N. J. Laws 1907, Ch. 250. Kentucky Statutes 1903, section 502, requiring acknowledgment of deeds of land in Kentucky actually executed abroad, construed, *Burt Lumber Co. v. Wilson*, (Ky. 1906) 93 S. W. 906. Alabama Code 1896, sections 982 *et. seq.* as to acknowledgment of a deed, construed; where both husband and wife acknowledge their signatures the deed may be valid although neither of them actually signed it, *Loyd v. Oates*, 143 Ala. 231, 38 S. 1022.

Where a mortgage was executed to a corporation an acknowledgment taken by a notary public who was, at the time, the general counsel for and a stockholder in the mortgagee company, was void. Such a notary, however, can be a good witness to the signature of the grantor, *Maddox v. Wood*, (Ala. 1907) 43 S. 968. A mortgage and mortgage note were acknowledged before the cashier of a bank, and the execution was valid operating as notice when recorded, although the mortgage was made to the president of the bank, *Kee v. Ewing*, 17 Okl. 410, 87, Pac. 297. Officers and stockholders of corporations may take acknowledgments of instruments in which their corporations are interested by Minn. Laws 1907, Ch. 406. And such heretofore taken are validated by ch. 89.

A deed of trust is void where the trustee named in the deed was the notary public before whom acknowledgments were taken; *Lance v. Tainter* 137 N. C. 249, 49 S. E. 211.

Sec. 3. Curative statutes.

Statutes curing defects in deeds, see *post* §70.

A defect in an Arkansas mortgage due to the failure of the mortgagor's wife to appear before the officer and acknowledge it was cured by Kirby's Digest, section 785, passed March 13, 1899, *Rhea v. Ins. Co.*, 77 Ark. 57, 90 S. W. 850.

Laws 1903, c. 1, validating deeds improperly acknowledged will not affect a mortgage foreclosure by an assignee under an assignment for lack of acknowledgment, *Cooper v. Harvey* (S. D. 1907) 113 N. W. 717.

Defective conveyances and acknowledgments are cured by Ark. Acts of 1907, No. 147. Defective acknowledgments of deeds and private examinations of married women, parties to deeds, if instruments dated prior to Jan. 1, 1905, are made valid by Del. Laws of 1907, Ch. 231. Defective acknowledgments taken by notaries public are cured by Ia. Laws 1906, Ch. 146. Acknowledgments taken by mayors and notaries public without authority legalized by Ia. Laws 1907, Ch. 249. Deeds, mortgages and bonds of conveyance, defective as to acknowledgments, certificates, witnesses and seals are made valid by Md. Laws 1906, Ch. 1, 342, 783. Acknowledgments taken by attorneys without authority and the records of deeds so acknowledged are made valid by N. J. Laws 1906, Ch. 212 and 213. The official acts of notaries public and commissioners of deeds are confirmed by N. Y. Laws 1906, Ch. 361. Sec. 260, Subd. 3, of the real property law, relating to the authentication of certificates of acknowledgment, is amended by N. Y. Laws 1907, Ch. 633. Defective certificates of acknowledgment are cured by N. C. Laws 1907, Ch. 83. Certain acknowledgments are validated and limitations imposed upon notaries by N. C. Laws 1907, Ch. 1003. All defective acknowledgments are made valid by N. D. Laws 1907, Ch. 138. Art. 2312 Rev. Civ. Stat., relative to admission of instruments with defective acknowledgments, amended by Tex. Laws 1907, Ch. CLXV. Acknowledgments taken by mayors and members of councils are validated by Va. Acts 1906, Ch. 78.

Sec. 4. Form and sufficiency of certificates. Omission of "sealed" in certificate of acknowledgment not to invalidate deed, N. J. Laws, 1906, Ch. 88. The date of expiration of his commission must be included as part of the "official signature" of a notary to a certificate of acknowledg-

ment, Comp St. 1903, Ch. 73, Sec. 14, *Sheridan County v. McKinney*, (Neb. 1907), 112 N. W. 329. A certificate authenticating a deed which stated that the other grantors "known to me to be the persons...acknowledged to me that he executed the same" was sufficient to permit record of the deed, *Hughes v. Wright & Vaughan*, (Tex. 1907), 101 S. W. 789. Where a statute provides no form for an acknowledgment the person executing the instrument must appear before a duly authorized officer and state that she executed it. Various Texas statutes which require acknowledgment as a prerequisite to recording, construed, *Punchard v. Masterson*, (Tex. 1907), 101 S. W. 204.

Objection was made to the certificate of acknowledgment to a deed of land, because it was signed by two officers in their double capacity of alderman and justice. Code 1819, c. 99, 87, authorize the acknowledgment to be made and certified before two justices of the peace; the word "alderman" can properly be regarded as surplusage, *Wilson v. Brader*, 56 W. Va. 372, 49 S. E. 409.

The record of a deed where the acknowledgment omitted the word "delivered" did not constitute notice thereof, *Ligon v. Barton*, 88 Miss. 135, 40 S. 555. An acknowledgment which recites that the grantor signed the deed but not that he "executed" or "delivered" it is void, does not entitle it to record, and does not make it constructive notice when recorded, *Elmslie v. Thurman*, 87 Miss. 537, 40 S. 67.

Sec. 5. Conclusiveness of certificate—Liability of officer for mistake in identity.

A certificate of acknowledgment of a mortgage of a homestead is void, when in fact there was no examination of or acknowledgment by the wife and this may be shown by oral evidence, *Chattanooga N. B. & L. Assn. v. Vaught*, 143 Ala. 389, 39 S. 215.

The evidence of the grantor denying the execution of a deed, and the opinion of the experts that the signature thereto is not that of the grantor, are not enough proof to overcome the certificate of acknowledgment of a deed, *Swiger v. Swiger*, 58 W. Va. 119, 52 S. E. 23.

In an action against a clerk for damages caused by a false acknowledgment, proof that the deputy clerk took the acknowledgment of an imposter made out a prima facie case of negli-

gence, but evidence that the imposter was introduced to the deputy by a reputable real estate agent would warrant a jury in finding that the prima facie case was overcome, *Commonwealth v. Johnson*, (Ky. 1906), 96 S. W. 801. Where in an action against a notary for damages due to a false certificate of acknowledgment where the plaintiff shows that the certificate was false, that he parted with money on the faith of it, and that the notary made it, the latter has the burden of proving that he acted in good faith and with due care in ascertaining the identity of the person who acknowledged the instrument, *Blaes v. Commonwealth*, (Ky. 1906) 96 S. W. 802.

Sec. 6. Married woman's certificate. Acknowledgment and certificate of married women to be in same form as those of single persons, *Id.* Laws 1907, Ho. Bill No. 19. The wife of the mortgagor of a homestead must be examined separately and must acknowledge the mortgage, *Chattanooga N. B. & L. Assn. v. Vaught*, 143 Ala. 389, 39 S. 215. In taking the acknowledgment of a married woman it is not necessary that she be examined apart from her husband. She is presumed to know the contents and nature of the instrument which she has signed, *Patnode v. Deschenes*, (N. D. 1906) 106 N. W. 573. When a notary's certificate of an acknowledgment of a husband and wife to a mortgage recited that the officer examined the wife separate and apart from her husband touching her signature "to the within mortgage" and that she acknowledged it, the certificate sufficiently certified that she appeared personally before the notary, *Sandlin v. Dowdell*, 143 Ala. 518, 39 S. 279. The intention of the statute requiring a privy examination of a married woman before taking her acknowledgment to a deed is to require the officer not simply to inquire whether she signed the deed freely and voluntarily, but he must explain to her fully the consequence of her act, or ascertain from her statement that she is fully advised. The failure of the officer to fully explain the transaction, however, does not vitiate the deed. It can only be attacked for fraud, *Cason v. Cason*, 116 Tenn. 173, 93 S. W. 89.

ACTIONS

See further Ejectment, Forcible Entry and Detainer.

Writ of assistance, see *post* §406.

Quieting title, see *post* §§475-479.

Sec. 7. In what actions title to real estate is involved
—As ground for appeal. A bill in aid of an execution for the purpose of subjecting real estate to the lien of a judgment, and satisfying the execution, does not involve a freehold, *Fairbanks v. Carle*, 217 Ill. 136, 75 N. E. 360. Under Hurd's Illinois Rev. St. 1903, c. 22, Section 3, a suit to enjoin the removal of a wing of a courthouse to another part of the courthouse grounds "may affect real estate" and must be brought in the county where the courthouse is situated, *Munger v. Crowe*, 219 Ill. 12, 76 N. E. 50.

As ground for appeal. Where in trespass *quare clausum* the question in dispute was the right of possession as between a receiver appointed in foreclosure proceedings and the mortgagor, a freehold was not involved and the Illinois Supreme Court had no appellate jurisdiction, *Douglas v. Park Bldg Ass'n v. Roberts*, 218 Ill. 454, 75 N. E. 1018. In order that the Illinois Supreme Court shall have appellate jurisdiction, a freehold must not only be invoked in the original decree, but also in the questions to be determined on the appeal, *Miller v. Kensil*, 223 Ill. 201, 79 N. E. 24. In a partition suit the question whether a lien on the share of one of the parties was created by the decree in a separate maintenance suit does not involve a freehold, and an inchoate right of dower is not property or a vested right, but a mere contingent expectancy. Upon these points therefore in Illinois the decree of the lower court is not appealable to the Supreme Court, *Lockport v. Licht*, 221 Ill. 35, 77 N. E. 581. Where in Illinois a case involves a freehold so that the appellate court has no jurisdiction the fact that the case was submitted to such court by both parties upon the merits without any question being raised as to jurisdiction does not preclude the successful raising of the question in the Supreme Court, *Audubon v. Hand*, 223 Ill. 367, 79 N. E. 71. Where after a foreclosure the buyer assigned his certificate of sale to the defendant who claimed the right to redeem as a judgment creditor, a master's deed was then executed and the complainant brought suit to set

aside the deed and for leave to redeem, a decree which gave the complainant a right to redeem within 90 days did not involve the title to a freehold and was not appealable, *Burroughs v. Kotz*, 226 Ill. 40, 80 N. E. 728.

A case involving the right of a person to a homestead exempt from execution does not involve the title to real estate so as to give the Missouri Supreme Court jurisdiction under the Missouri Constitution, *Snodgrass v. Copple*, (Mo. 1907), 101 S. W. 1090.

A bill by a lawyer to enforce specific performance of a contract for the sale of a freehold is appealable in Missouri to the Supreme Court, as involving the title to real estate, *Barnes v. Stone*, 198 Mo. 471, 95 S. W. 915.

Probate of will. Where the probate record shows the testator owned real estate which passed under a residuary clause the Illinois Supreme Court has appellate jurisdiction, a freehold being involved, although the will does not in terms devise real estate, *Senn v. Greundling*, 218 Ill. 458, 75 N. E. 1020. An appeal from a decree establishing a last will does not lie upon the ground that a freehold was involved merely because the principal part of the estate was land where the appellant's only interest concerned a legacy, *In re Ross' Estate*, 220 Ill. 142, 77 N. E. 126.

ADVERSE POSSESSION

Effect of on boundaries, see *post*, §26.

Acquisition of easement by prescription, see *post*, §105.

As to rights of occupying claimants to improvements, see *post* §§259-262.

Title in irrigation rights by, see *post* §279.

In railroad right of way, see *post* §483.

Statute of limitations, see *post* §§512-519.

Sec. 8. Whose possession is adverse.

When, under a decree ordering the plaintiff restored to the possession of certain premises and condemning the defendant to pay a certain sum with costs, a writ issued and a certified copy of the decree annexed thereto for the guidance of the sheriff, and all parties acquiesce in construing and enforcing such writ as one of *bien facias*, the purchaser of

property sold thereunder will be regarded as a possessor in good faith whose title is protected by the ten year prescription, *Decuir v. Loeb*, 118 La. 332, 42 S. 955.

When the oral donor of land who had put the donee in possession continued to pay the taxes and negotiated to sell the mineral rights the donee's possession was not adverse, *Gillespie v. Gillespie*, (Ala. 1907) 43 S. 12.

A husband who occupied his wife's land after her death as tenant by the curtesy and conveyed them to his second wife, having in the meantime taken a conveyance from third parties who had no title, was not in adverse possession. Upon his death the first wife's heirs could sue for recovery of the premises, *Hinton v. Farmer*, (Ala. 1906) 42 S. 563. Where a widow occupied land bought by her deceased husband for many years without having dower assigned to her it was held that her possession was not adverse to her husband's heirs, because she entered under her husband and was holding under her husband, *Moore v. Gulley*, (Ky. 1907) 98 S. W. 1011. The statute of limitations did not run against an action by a wife to have deeds in which her husband was grantee ordered held in trust for her where his possession was taken before the passage of the Missouri Statute restricting the husband's common law rights in his wife's land. Such possession was not adverse because by the marriage her seisin and possession passed to him, *Smith v. Smith*, 201 Mo. 533, 100 S. W. 579. Facts held to show that the adverse possession of a husband was continued through the occupation of the premises by his widow as a homestead and ripened into a perfect title in his heirs, subject to her life estate, *Larson v. Anderson*, (Neb. 1905) 104 N. W. 925.

Landlord and tenant. Where a tenant holds possession of land under a lease for 2,000 years, he is not estopped to deny his landlord's title when he has held possession under an unchallenged title, derived from a court order for the partition of real estate, for over 60 years, and a subsequent foreclosure sale passed a title in fee to the purchaser, *Townsend v. Boyd*, (Pa. 1907) 66 Atl. 1099.

Licensee. Where A went into possession, with B's verbal assent, of land owned by B, A or his heirs cannot claim title by adverse possession when there was no positive act showing that A disclaimed B's title, *Thompson v. Camper*, 106 Va. 315, 55 S. E. 674. When a railroad company builds a bridge,

placing the abutments on land acquired under a license from the owner, it cannot acquire title by adverse possession, and although a sale of the property is held to satisfy a mechanic's lien and all the masonry and the bridge itself are sold, without including the land, such a sale does not furnish a point from which to claim a title by adverse possession, *Nicolai v. Mayor of Baltimore*, 100 Md. 579, 60 Atl. 627.

Where land was devised for life with remainder in case the life tenant left no children to a charity, title to be vested in trustees appointed by the court, the possession of the life tenant's heir, who died childless, is not adverse to the trustees before they are appointed, *Kennedy's Adm'r v. Trustees*, Linn O. A., 31 Ky. Law Rep. 766, 103 S. W. 340. Under a written instrument which conveyed only a life estate parol evidence that the grantor thought it conveyed a fee and the grantee so claimed, and the grantor always acquiesced, never asserted her claim and died recognizing the grantee's claim, is admissible to show adverse possession, *Breland v. O'Neal*, 88 Miss. 449, 40 S. 865.

Parent and child. The possession of a mother cannot be adverse to the title of her children notwithstanding Sections 2 and 3, Chap. 205 Gen. Laws, and 20 years' possession gives her no title, *Searle v. Laraway*, 27 R. I. 557, 65 Atl. 269. A devise to the widow for life or until her three sons became of age, did not give her an estate in the land which prevented limitations from running in favor of a son in possession against the other heirs, *Whitaker v. Jenkins*, 138 N. C. 476, 51 S. E. 104. In Alabama children who through the administrator of their mother's estate, their guardian and agent, remain in possession of land 14 years after their parent's decease thereby acquire title by adverse possession, *Killebrew v. Maudlin*, 145 Ala. 654, 39 S. 575. Where a father who had conveyed to his five children reserving in himself the right to convey and reinvest for their benefit, joined some of the children in a conveyance to a third person of the right to cut timber on the land for ten years, time for removal being later extended, the grantee in the latter deed was not holding adversely to those children who were not parties thereto, *Gulf Lumber Co. v. Crenshaw*, (Ala. 1906) 42 S. 564.

Partner. Where land was conveyed "bounded 35 feet on O Street and 28 feet on S Street" with no monuments, and the other boundaries by land of the grantor, the attitude

and acts of the partner must be considered concerning the actual possession of the land with the building on it, and although the grantor was the agent for collecting the rents from the building, etc., that fact would not prevent him from acquiring title to land by actual adverse possession, *Carney v. Hennessey*, 77 Conn. 577, 60 Atl. 129.

Vendee. Where there was an oral contract to convey land, and said land was held for more than 20 years under the oral contract, and taxes on it were paid by the possessor, it was decided that a good title had been acquired by adverse possession, *Dean v. Gupton*, 136 N. C. 141, 48 S. E. 576. In order to establish title by adverse possession one who enters under a contract must show that his occupation has become adverse and been such during the required time, *Lanham v. Bowlby*, (Neb. 1907) 112 N. W. 324. When the vendee of an executory contract for the sale of land looks to his vendor for title he cannot rely upon the statute of limitations as a bar to a suit for the purchase money, but where he relies for title upon his adverse possession for a time at least equal to the statutory period, he may do so, *Bloom v. Sawyer*, (Ky. 1905) 89 S. W. 204. Where land is claimed by one who relies solely upon adverse possession, under claim of right, but without deed or other paper title, and where his entry upon and possession of the property were under an alleged contract of purchase, it is necessary on the part of the purchaser to sever the relations of vendor and vendee by avowing adverse possession on the part of the purchaser before possession becomes adverse, *Marbach v. Holmes*, 105 Va. 178, 52 S. E. 828. In 1868 A bought land for a home for his nephew B, taking title in his own name and entering into a written agreement to convey the land when the sum loaned for the purchase of the land was repaid. The title remained in A, but B remained in possession as owner; Held, the plaintiffs, heirs of A, were barred by laches, from recovering the land, *Woodward v. Barr*, 128 Ia. 727, 105 N. W. 207.

Sec. 9. Co-Tenants—Ouster.

See further, *post* §568. If a co-tenant holds for 20 years, her possession is not adverse to the other co-tenants unless the evidence shows that she has held with no recognition of their rights, *Woodlief v. Woodlief*, 136 N. C. 133, 48 S. E. 583.

Ouster. Where a grantee under an unrecorded deed purporting to convey the fee entered and remained in exclusive possession for more than twenty years the jury were warranted in finding that he had in fact disseised a co-tenant who knew of his possession and acquiesced in it, *Joyce v. Dyer*, 189 Mass. 64, 75 N. E. 81. Where there was evidence that one co-tenant had occupied for about 20 years, the lands were assessed to him alone, and before his death he executed a deed of them to his wife it was a question for the jury whether he had effected an ouster of his co-defendants and thus gained title by adverse possession, *Hamby v. Folsam*, (Ala. 1906) 42 S. 548. A conveyance by one co-tenant which nowhere referred to the interest of his co-tenants operated as an ouster which started the statute of limitations running in favor of the grantee claiming sole ownership. The fact that the deed was not recorded for a long time and that suit was begun within 10 years of such recording was immaterial, the grantee having already held under the deed 10 years, *Eastman, Gardiner & Co. v. Hinton*, (Miss. 1905), 38 S. 779. In partition proceedings, where a tenancy in common once existed and was followed by a parol partition between the tenants, when each took possession of the part allotted to him and held exclusive possession for 30 years, without any demand or claim for an account of rents, issues, or profits from his co-tenant, the law raises the presumption that the sole possession was rightful and will protect it, and where the tenant out of possession brings ejectment, his entry will be considered as tolled and his right of action will be barred, *Rhea v. Craig*, 141 N. C. 602, 54 S. E. 408.

No ouster. A defendant who has held possession under deeds only purporting to convey a five-sixths interest in the land is not holding adversely to the owner of the other one-sixth interest, *Chapman v. Kullman*, 191 Mo. 237, 89 S. W. 924. It was found that the possession of certain persons claiming under a will was not in fact adverse to that of the testator's other heirs, in *Shepperd v. Fisher*, (Mo. 1907) 103 S. W. 989. The defendant took possession of land in 1889, received a grant from the state in 1890, but his title by adverse possession under color of title did not accrue by 1902, when a co-tenant of the plaintiff had occupied part of the land until 1896, *Lindsay v. Austin*, 139 N. C. 463, 51 S. E. 990. A purchaser of real estate owned jointly by the wife's heirs and the

husband's heirs, did not obtain a title by prescription in fifteen years, although he held under a deed from the wife's heirs described as "the sole surviving heirs," when he did not hold adversely to the husband's heirs, but had made every effort to find them and purchase their interest. When the husband's heirs appeared they were therefore entitled to a half interest in the property, *Sparks v. Bodensick*, 72 Kan. 5, 82 Pac. 463.

Sec. 10. Claim necessary. Evidence examined and held not to sustain a finding that one party had been in adverse possession of land so as to start the statute of limitations running in his favor, *Missouri Lumber and Mining Co. v. Jewell*, 200 Mo. 707, 89 S. W. 578. When a woman who cannot read takes a tax deed containing interlineations, justifiably believing that they were made by the officer who executed the deed, she is a possessor in good faith protected by the ten year prescription, *Hickey v. Smith*, 118 La. 169, 42 S. 762.

If a grantor enters upon premises he has sold to the grantee under a warranty deed and appropriates water from a stream, putting up a notice that he claims the water as his right, the grantor will acquire the title by adverse possession after more than 20 years, *Gardner v. Wright*, (Ore. 1907) 91 Pac. 286.

Hostile possession. Possession "hostile in the beginning" within the meaning of the statute of limitations means hostile as a matter of law, *Purtle v. Bell*, 225 Ill. 523, 80 N. E. 350. In an action to recover possession of land it is not error to define adverse possession (relied upon by the defendant) as "hostile possession," meaning the holding of the land against all other claimants, *Taylor v. Hover*, (Neb. 1906) 108 N. W. 149. When a man has been living upon land, claiming to a well-defined marked boundary, and using it adversely, openly, and uninterruptedly against all the world for more than 30 years his title is as perfect as if it had been originally patented to him by the Commonwealth, and he had never been divested of it, *Aikman v. South*, Ky. 1906) 97 S. W. 4.

Permissive user. Evidence examined and held to show that the user of a certain way had been permissive not adverse, and that therefore no easement had been acquired therein, *Null v. Williamson*, 166 Ind. 537, 78 N. E. 76. The possessor of land who did not know where the boundaries were or who

owned it, and who never listed it for taxation, could not acquire title by adverse possession, *Heckescher v. Cooper*, (Mo. 1907) 101 S. W. 658. Where the plaintiff for more than 15 years used the defendant's passway more or less regularly when the gate was not locked, but never attempted to open it when locked, and unsuccessfully tried to arrange with the defendant's directors to have its use uninterrupted, the user was permissive not adverse, *Prewitt v. Hustonville Cemetery Co.*, 31 Ky. Law Rep. 125, 101 S. W. 892. When A had contracted to buy land, he paid the first installment on it and then had the title made out to B to be held as security for loans advanced. A continued in possession of the land and after B's death he tendered the amount of his debt and asked for a reconveyance from B's administratrix, but nothing was done. Although A and his heirs held possession of the land for 18 years, their possession was held to be permissive as they did not deny the validity of B's legal title by any overt act, not claiming to hold adversely. Therefore they might equitably be granted a reconveyance on payment of the debt with interest, *Doris v. Story*, 122 Ga. 611, 50 S. E. 348.

Mistake as to boundaries. It is the intention of the statute dealing with the adverse possession of land to deal with the actual possession of the one claiming adversely and not to be affected by a mistake as to the true boundary where one adjoining owner occupies a narrow strip of his neighbor's lot which both owners suppose is included within the limits of the former's, *Weeks v. Upton*, 99 Minn. 410, 109 N. W. 828. When a landowner, acting under a mistake as to the true boundary between his land and that of another, takes possession of land of another, believing it to be his own, incloses it, claims title to it, and holds possession for the statutory period, he becomes the owner, for such possession and claim of title though founded on a mistake would be adverse, but this would not be so if his intention was to claim only to the true line wherever that may be for then the possession would not be adverse beyond such line, *Shirley v. Whitlow*, 80 Ark. 444, 97 S. W. 444.

Sec. 11. Notice of claim to true owner. A possession begun under the true title of another does not become hostile until the occupant brings home to the true owner notice by open and unequivocal acts that he holds against all claimants.

McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997. The statement of a landowner while an adjoining owner was building a wall which varied from the record boundary that he was glad that it was being built straight and that "we will give and take" was relevant to show a present oral exchange sufficient to serve as a basis for a later holding in adverse possession, Gray v. Kelley, 190 Mass. 184, 76 N. E. 724.

Notoriety. The defendant, claiming by adverse possession, may offer evidence that his claim of title was generally known in the vicinity, to show its notoriety (not his title), and when the plaintiff introduces the original assessment books to show that the land was not assessed to the defendant the latter may testify that it was assessed to him, in fact, Doe ex dem. Anniston City Land Co. v. Edmondson, 145 Ala. 557, 40 S. 505.

Sec. 12. Time necessary.

Time of adverse possession under color of title, see *post*.

§14.

Mass. Rev. Laws, c. 182, section 15, which entitles one who has been in possession of land for 20 years without in any way recognizing the validity of a mortgage thereon to a decree absolutely barring all persons claiming thereunder, construed, Mitchell v. Bickford, 192 Mass. 244, 78 N. E. 453. When a purchaser took possession and after eight years cut the tract up into town lots and sold them to persons who made valuable improvements a suit by an adjacent owner to establish the boundary and his right to the land brought within a couple of months of the expiration of twenty years from the original purchase is barred by lapse of time and the statute of limitations, Goodwin v. Garibaldi, (Ark. 1907) 102 S. W. 706.

Sec. 13. Extent of possession.

Constructive possession under color of title, see *post* §14.

When a man without title enters upon the land of another he acquires no right by adverse possession beyond his close against the true owner, unless the possession is then vacant, Phillips v. Timber Co., (Ky. 1905), 88 S. W. 1058. Occupancy, giving title by adverse possession, held to include the space covered by the roof cornice, by the movement of the window shutters and the drains, Atkins v. Pfaffe, (Ia. 1907), 114 N. W. 187. Under Rev. St. c. 106, s. 38, when a part of

land is occupied by one not the true owner a title by adverse possession is only acquired for any part actually occupied, unless under cover of title, *Banton v. Herrick*, 101 Me. 134, 63 Atl. 671. Indefiniteness of description of land covered by a contract to convey may be cured by possession of a definite tract, *Chicago, K. & S. R. Co. v. Lane*, (Mich. 1907), 113 N. W. 22. *Kennedy v. Manus*, 138 N. C. 35, 50 S. E. 450. When for more than 20 years a certain tract has been incorporated into a plantation by fencing and used openly, notoriously, and without interruption or disturbance, upon a sale of the plantation by the sheriff by name and by metes and bounds, the tract passes with the plantation by a title whose defects, if any, are cured by 10 years prescription when the occupier remains in possession in good faith, *Booksh v. New Iberia Sugar Co.*, 115 La. 516, 39 S. 545. When a wharf was burned down and the owners of one of the shore lots occupied one of the ends of the wharf by a warehouse, they only acquired by adverse possession a title to the property they actually occupied and they were not entitled to maintain an action against a grantee from the owner of the burned wharf to prevent his rebuilding the part of the wharf not occupied by the plaintiffs, when the plaintiffs did not claim under color of title, *Grant v. Oregon R. & Nav. Co.*, (Ore. 1907) 90 Pac. 178.

Where one grant of land conflicts in part with another, occasioning what is called a lap or interlock, and the junior patentee settles upon that portion of the land within the "interlock," claiming the whole as his own, he thereby ousts the senior patentee of his constructive seisin and becomes actually possessed to the extent of his grant. Here possession of part is possession of the whole, *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

Sec. 14. Color of title. In Indiana color of title is not necessary to constitute adverse possession, *May v. Dobbins*, 166 Ind. 331, 77 N. E. 353. Upon the evidence the only defects in the record title were cured by 38 years adverse possession and the title was therefore marketable, *Freedman v. Oppenheim*, 187 N. Y. 101, 79 N. E. 841.

What invalid deeds are sufficient. An instrument in the form of a deed signed by a mark bearing an invalid acknowledgment purporting to be made by an officer, but with a good attestation, constituted color of title, *Davis v. Arnold*, 143

Ala. 228, 39 S. 141. A deed which is void because not joined in by the grantor's husband gives the grantee color of title within the statute of limitations, *Southern Ry. Co. v. Hayes*, (Ala. 1907) 43 S. 487. It was held that although a quitclaim deed did not convey the title because not sealed as required by law at the date of its execution it was sufficient to show a color of title within the statute of limitations, *Perkins Land & Lumber Co. v. Irvin*, 200 Mo. 485, 98 S. W. 580. According to Revisal 1905, s. 980, an unregistered deed held by the defendant in a suit for cutting timber may be admitted as color of title against one holding under a different set of deeds. *Janney v. Robbins*, 141 N. C. 400, 53 S. E. 863. Adverse possession by a church of land given to it under a void deed gave a good title in *Regents of U. of M. v. Calvary M. E. Church*, (Md. 1906) 65 Atl. 398. A man who enters under an unrecorded title is justified in believing he is the owner and acquires possession of the entire estate which the former possessor abandons to him. He is not like a trespasser who "acquires possession inch by inch only of the part he occupies," *Bernstine v. Leeper*, 118 La. 1098, 43 S. 889. When a deed relied on as color of title is made to defraud the creditors it is not void *ab initio*, see Civ. Code 1895, sec. 3584, providing that "possession to be the foundation of prescription must not originate in fraud," and the deed grants a valid title against those not injured by the fraud, *Moore v. Mobley*, 123 Ga. 424, 56 S. E. 351.

Deeds insufficient. A sale of land conditional on the Secretary of the Interior deciding that the state was the owner cannot serve as a basis for prescription where he decided it was not the owner, *Albert Hanson Lumber Co. v. Angelloz*, 118 La. 861, 43 S. 529. In ejectment a deed to the plaintiff from a person as agent acknowledged as an individual is not admissible as color of title where the grantor never had title and neither the plaintiff nor the grantor's alleged principal ever had been in possession, *Doe ex dem. Wilson v. Hammond*, 146 Ala. 687, 40 S. 343. When a purchaser derives title from the executor of the will, he cannot claim that a deed was color of title which erroneously granted more than was intended and a prescriptive title was not acquired, although possession was had for more than seven years, *Sanders v. Thompson*, 123 Ga. 4, 50 S. E. 976. When an infant had a deed to land but died before going into actual possession and the father

took possession of the land, his possession cannot be adjudged to be for the benefit of his children when he made no claim to that effect, but claimed it for himself, and his children could not use his possession to obtain for themselves a title by adverse possession under color of title, *Barrett v. Brewer*, 143 N. C. 88, 55 S. E. 414. A person who entered land as a squatter, intending to buy of the first person who would sell to him, and received a deed in 1893 which was not recorded till 1903, a few days prior to the bringing of an ejectment against him, and who paid no taxes and only cleared five acres in 12 years, was not in adverse possession under color of title, *Hunter v. Wethington*, 205 Mo. 284, 103 S. W. 543. A quitclaim deed by a tenant in common is not color of title for the entire fee unless it purports to cover all interest in the tract in question, *Waterman Hall v. Waterman*, 220 Ill. 569, 77 N. E. 142.

Description of Property. When the plaintiff brings a suit to quiet title, and relies on adverse possession under color of title, he must show where his land is, from a call in the deed for some natural object for a correct location, *Marshall v. Corbett*, 137 N. C. 555, 50 S. E. 210. A deed from the State Auditor which omits to state whether the township within which the land lies is north or south of a certain base line is void as a muniment of title, on account of uncertainty, but is admissible to show color of title under which possession was actually taken, *Rogers v. Keith*, (Ala. 1906), 42 S. 446. Although a writing containing an agreement to convey land is relied on as color of title, it is not available when the description of the land is so vague that it cannot be identified and when there is no other evidence legitimately before the court showing that the description applies to this particular piece of property, *Priester v. Melton*, 123 Ga. 375, 51 S. E. 330. If a deed offered in evidence by an administrator of an estate is void on account of insufficient description of the land in question, then it cannot be used as evidence of adverse possession under color of title, although it is proved that the grantee in the deed entered into possession of some land belonging to the grantor, *Whitehead v. Pitts*, 127 Ga. 774, 56 S. E. 1004.

Extent of possession. Adverse possession under a deed is not limited to that actually possessed, but covers the whole lot described therein, *Campbell v. Bates*, 143 Ala. 338, 39 S. 144. Actual possession of part of a tract carries possession of the whole according to the boundaries described in the pos-

essor's title, *Mott v. Hopper*, 116 La. 629, 40 S. 921; *Rucker v. Dixon*, 78 Ark. 99, 93 S. W. 750. A grantee in a deed of two adjacent tracts, only one of which the grantor owned, does not by taking actual possession of that one get constructive possession of the other, *St. Louis I. M. & S. R. Co. v. Moore*, (Ark. 1907), 103 S. W. 1136. Occupancy of a part of a tract of land through a tenant under color of title to the whole gives title to the whole under the statute of limitations, *Wheeler v. Foote*, 80 Ark. 435, 97 S. W. 447. When A possessed a tract of 75 acres and claimed under color of title a tract of 200 acres adjoining, he did not acquire title to it by adverse possession when it was not proved that he held actual possession of the 200 acre tract, *Camden v. W. B. Lumber Co.*, 59 W. Va. 148, 53 S. E. 409. When a person who owns one lot only, conveys two, an entry by the grantee upon the one the grantor owned does not dispossess the owner of the other so as to make adverse possession, *Henry v. Brown*, 143 Ala. 446, 39 S. 325. An owner of a large tract out of which a certain 500 acre lot has been sold by the sheriff upon an execution against him who later enters into possession of his tract does not thereby obtain adverse possession of the 500 acre lot. This is because constructive possession extends only as far as the legal title, *Woodward v. Johnson*, (Ky. 1906) 90 S. W. 1076. Where an entry was made on land partly meadow and partly wood lot under color of title to the whole, adverse possession of the meadow with the use of the wood for over thirty years was sufficient to establish a valid title by adverse possession, *Banton v. Herrick*, 101 Me. 134, 63 Atl. 671. The whole of the land is acquired by adverse possession when entry on it has been made for more than 20 years under color of title, and a title to as much as is covered by the deed is acquired by adverse possession, *Banton v. Herrick*, 101 Me. 134, 63 Atl. 671.

There can be no constructive possession of the same land by conflicting claimants. In the absence of any actual possession, if there be any constructive possession, it must necessarily be by the holder of the best title, unless he had renounced it. If, therefore, after a senior patentee enters and takes possession, a junior patentee or one without title enters on the land, his possession is confined to his close, *Bates v. Collins*, (Ky. 1906), 93 S. W. 615. The doctrine was reaffirmed that "constructive possession follows the title until

there has been an invasion of the possession of the rightful owner by an actual occupancy of at least a part of the tract, and an actual occupancy of a part of a contiguous tract owned by another does not oust the constructive possession of the true owner, even though both tracts be described in the same instrument," *Hardie v. Investment Guaranty Co.*, 81 Ark. 141, 98 S. W. 701.

Time. A person in possession of land under color of title continuously, openly, and adversely for more than seven years is entitled to have his title quieted, *Van Etten v. Daugherty*, (Ark. 1907), 103 S. W. 737. Where a railway held a deed granting a right of way, and had cleared on either side of its track for 100 feet and maintained that width for over twenty years, it had acquired a valid title by adverse possession under color of title, especially when the charter granted a right of way of 200 feet, *Bennett v. Atlantic Coast Line R. Co.*, 126 Ga. 411, 55 S. E. 177. Rev. St. 1887, Sec. 4062, 4,039, 4,037, were construed to permit a bank, which had entered into the possession of property under color of title, to acquire a valid title by adverse possession which would defeat any right of action by the mortgagor after 10 years, as five years would have been sufficient under Rev. St. 1887, Sec. 4,036 and 4,037, *Fountain v. Lewiston Nat. Bank*, 11 Idaho 451, 83 Pac. 505. To maintain a plea of ten years' prescription there must be actual possession in good faith during the period under title as owner, *Ramos Lumber Co. v. Sanders*, 117 La. 615, 42 S. 158. Where the appellant has been in the uninterrupted, honest and adverse possession of land, under color of title, from 1877 to 1905, alleged clouds upon his title are imaginary rather than real; having been cured by lapse of time if any defects existed originally, *Bryan v. Augusta Perpetual Building & Loan Co.*, 104 Va. 611, 52 S. E. 357.

Sec. 15. Acts necessary—Evidence.

Acts sufficient. Twenty-three years' use of an arched way connecting two parts of a farm on each side of a railroad gives the owner title by adverse possession, *Lamb v. Pontiac, O. & N. R. Co.*, (Mich. 1907), 113 N. W. 1110. Where an adjoining owner put a fence across the land of another and occupied that other's land up to the fence in connection with his own for the statutory period he acquired title thereto by adverse possession, *Thomas v. Dowdle*, (Ark. 1905) 89 S. W.

1004. To show the prescription of 30 years there must be corporeal possession at the beginning continued or preserved by external and public signs announcing such possession and intention to possess. This latter rule applies to swamp lands as well as any others, *Ramos Lumber Mfg. Co. v. Sanders*, 117 La. 615, 42 S. 158. When a grantee under a conveyance which gave a river as a boundary went into possession by operating a mill and using the water power created by a dam and it and its successors kept the dam in repair and exercised such acts of ownership therein as was possible under the circumstances, there was possession of the dam protected by the Illinois seven year statute of limitations, *Hurd's Illinois Rev. St. 1905, c. 83, section 6, Godfrey v. Dixon Power & Lighting Co.*, 228 Ill. 487, 81 N. E. 1089. An entry upon land with the intention of asserting ownership, and continuing in the open and exclusive possession thereof, exercising the usual acts of ownership under such claim, without asking permission and in disregard of all other claims, is sufficient to make the possession adverse. Such possession continued uninterruptedly for 20 years or more will establish title to the extent that the possession is actual and exclusive, *May v. Dobbins*, 166 Ind. 331, 77 N. E. 353.

The open, exclusive and notorious possession and cultivation of open lots, though without claim of right or color of title, together with payment of taxes is sufficient basis for adverse possession giving title by prescription, *Dredla v. Patz*, (Neb. 1907) 111 N. W. 136. The payment of taxes upon wild land, the cutting of timber to the same extent as upon lands admittedly belonging to the claimant and the selling of it with the knowledge of the other claimant, the placing of mortgages upon it and the offering of it for sale to the public are all acts of material value in showing that one claiming by adverse possession exercised dominion over such land, *McCaughn v. Young*, 85 Miss. 277, 37 S. 839.

Acts insufficient. It was held that the mere fact that a man has obtained conveyances of land is "not in itself sufficient to invest him with an adverse holding of the land, *Collinsworth v. Enterprise Land, Mineral & Lumber Co.*, (Ky. 1907), 99 S. W. 234.

The occupation of wild land merely for camping and hunting does not constitute such adverse possession as would notify the true owner of the alleged occupant's claim, *Nona*

Mills Co. v. Wright, (Tex. 1907) 102 S. W. 1118. One who merely fenced in another's land bounded on the other sides by a river and a creek, and then pastured his cattle thereon, was not in adverse possession of this neighbor's land, *Dowdle v. Wheeler*, 76 Ark. 529, 89 S. W. 1002. It was held that "herding cattle, cutting timber, and selling to others the right to do so" did not amount to "actual possession though done under color and actual claim of title," *Crain v. Peterman*, 200 Mo. 295, 98 S. W. 600. A person who never was in actual possession nor exercised acts of ownership or occupancy over land, except to cut rails, boards, and some pine or light wood, and post signs forbidding trespassing, could not thereby acquire title by adverse possession, *A. W. Stevens Lumber Co. v. Hughes*, (Miss. 1905), 38 S. 769. In Louisiana actual possession of part of a tract with title to the whole and intention to possess the whole is possession of the whole and is not ousted in the case of open prairie land by the act of plowing some furrows around it which probably became hidden with grass and were not in fact noticed by persons who went over the land, *Jones v. Goss*, 115 La. 926, 40 S. 357. Where a corporation claiming certain tide lands by deeds had paid the taxes on them, received the rent for anchorage of house boats which were not there continuously, and had erected no buildings on the flats, the corporation had not acquired title by adverse possession. *Seabrook v. Coos Bay Ice Co.*, (Ore. 1907) 39 Pac. 417. Persons who hold possession of 20 acres of land under a deed describing a whole quarter section have constructive possession of all the premises described in their deed. A claim of ownership, payment of taxes, occasional cutting of timber and the employment of agents to watch to prevent trespassing, constitute only "fitful acts of ownership," which do not give a title under the statute of limitations, *Connerly v. Dickinson*, 81 Ark. 258, 99 S. W. 82.

Evidence examined and held to show that title to land had been acquired by adverse possession in *Haddix v. Fairchild*, (Ky. 1905), 89 S. W. 171, and in *Hall v. Bowman*, (Ky. 1906) 90 S. W. 1051. Evidence examined and held to show the establishment of a passway by adverse use for the statutory period, *Ray v. Nally*, (Ky. 1905) 89 S. W. 486. When there is some evidence of adverse possession the question should be left to the jury, *Ball v. Loughbridge*, (Ky. 1907) 100 S. W. 275. Testimony that a person was in open and notorious pos-

session is not admissible because mere opinion but it is allowable to show that one claiming title by adverse possession did not return it for taxation, *Driver v. King*, 145 Ala. 585, 40 S. 315. A charge to a jury upon the issue of adverse possession that they find for the defendant if he "was in actual, open, and adverse possession of the lands sued for, claiming to be rightfully in possession thereof," was erroneous as it left for their determination a question of law. The constituents of adverse possession should have been set forth, *Chambers v. Morris*, (Ala. 1906) 42 S. 549. Testimony by a person whose possession was claimed to have been adverse that he paid \$9,000 for the land and that his predecessor in title and possession sued in trespass a street railway company for building its railroad over part of the land, was competent, *Luce v. Parsons*, 192 Mass 8, (77 N. E. 1032).

Sec. 16. Payment of taxes. When lands are wild and unimproved the continuous payment of taxes for the period named in the statute of limitations under color and chain of title thereto is sufficient to sustain a finding that the man who so pays is the owner, *Hardie v. Bissell*, 80 Ark. 74, 94 S. W. 611. A purchaser at a partition sale, holding title under a commissioner's deed to the entire property, who occupies and pays taxes on the land for twenty-four years, thereby acquires title by adverse possession, *Long v. Osceola Consolidated Mining Co.*, 145 Mich. 370, 108 N. W. 678. The payment of taxes for seven years, referred to in *Kirby's Arkansas Digest*, sec. 5057, which provides that one who pays taxes on unimproved and uninclosed lands shall be deemed in possession thereof, held to mean payment and unbroken possession for seven consecutive years, *Updegraff v. Marked Tree Lumber Co.*, (Ark. 1907), 103 S. W. 606. Constructive possession is that possession which the law annexes to the legal title or ownership of property when there is a right to immediate actual possession but no actual possession. The payment of taxes on land is not of itself evidence of possession, but in connection with evidence of actual possession, is admissible to show the extent of such possession, *Southern Ry. Co. v. Hall*, 145 Ala. 224, 41 S. 135; *McCaughn v. Young*, 85 Miss. 277, 37 S. 839. See *Dredla v. Patz*, (Neb. 1907) 111 N. W. 163.

The failure of one claiming title by adverse possession to pay taxes on the land occupied is "strong and forcible evi-

dence that the possessor did not intend to claim title adversely to the owner," *Bush v. Griffin*, (Neb. 1906) 107 N. W. 247. Where in an action of trespass to try title brought in December, 1903, it appeared that there had been five years adverse possession by the defendants but they had not paid the taxes for the year 1903 no title had been acquired under the five year statute of limitations, *Club Land & Cattle Co. v. Wall*, (Tex. 1906) 92 S. W. 984. Code Civ. Proc. s. 325, relating to the payment of taxes by one in adverse possession of land, was construed to provide that, when the owner paid the taxes for one year of the five years required to establish the title by adverse possession, the prescriptive right was broken, *Commercial Nat. Bank v. Schlitz*, (Cal. 1907) 91 Pac. 750.

Sec. 17. Continuity—Estoppel. Evidence that a decedent was at one time in possession of land unaccompanied by any evidence that he exercised an act of ownership over it for several years before his death does not show continuous possession, *Henry v. Brown*, 143 Ala. 446, 39 S. 325. A grantee who together with his predecessor in title has held land adversely for seven years has acquired title by the statute of limitations. The sixth year a flood drove the tenants off and the land remained idle, but as two years later he planted trees on it there was no abandonment, *Robinson v. Nordman*, 75 Ark. 593, 88 S. W. 592. Where the plaintiff brought an action for damages for trespass on land, claiming 20 years adverse possession, the burden was on the plaintiff to show continuous possession, *Monk v. City of Wilmington*, 137 N. C. 322, 49 S. E. 345.

Continuity of possession necessary. In a suit for title to land through adverse possession, a five year interval of adverse possession, and subsequently another six months interval cannot be tacked together to form a good prescriptive title, *Clark v. White*, 120 Ga. 957, 48 S. E. 357. Code Civ. Proc. §§318, 319 was construed to allow a title acquired by A from B and C who had held the property adversely to the owners for four years, to become valid when A held it for one year more making the statutory five years, and a short interval when the property was not occupied by A after the transfer of title did not interrupt the continuity of the adverse possession, *Botsford v. Eyraud*, 148 Cal. 431, 83 Pac. 1008.

Estoppel. "The statute of champerty applies only to a

case where another is in adverse possession of the premises being conveyed." An occupant who "had admitted previously that his holding was not adverse, but amicable, to the vendor—would not therefore be permitted to say, at least without giving notice of his renouncement of amicable holding, to the true owner, that his possession was hostile," *Madison Stockyards Co. v. Frazee*, (Ky. 1906) 98 S. W. 283. Where the defendant's predecessors took possession of a lot formerly owned by a city and maintained a stable thereon for 20 years, the lines of the lot being marked out by the city's officials as appurtenant to the stable and assessed to the occupants who paid the taxes thereon for 6 years, they had gained title by the statute of limitations. But a disclaimer by them of all title thereto in their return of property for taxation under oath constituted a waiver of their claim by adverse possession, *Mayor of Baltimore v. Rowe*, (Md. 1907), 67 Atl. 93.

No estoppel found. The application for a cash entry at the U. S. Land office, by one who has been in adverse possession of land for the full statutory period, does not impair his rights acquired under the statute, *Wiese v. U. P. Ry. Co.*, (Neb. 1906) 108 N. W. 175. Recognition after the full statutory period has elapsed will not have any "effect for when title by limitation has become vested in the adverse claimant a mere recognition of some other title does not reveal the title acquired by adverse possession," *Shirey v. Whitlow*, 80 Ark. 444, 97 S. W. 444. When an adverse possessor acquired an outstanding title she is not estopped to claim under her own previous one. Such a purchase is made probably to settle a dispute or possible law suit, not admitting its validity for any purpose, but choosing that method as the simplest and cheapest way of avoiding litigation, *Fitch v. Gentry*, (Ky. 1906) 92 S. W. 586. "Any act done after seven years' occupancy in recognition of the claim of the original owner would only be important, when done by the same person who had held for the statutory period, as a circumstance tending to show the character of the possession, whether adverse or not. If done by a subsequent holder under grant, devise or inheritance from one who had held adversely for the full statutory period as to amount to an investiture of title, such act of recognition would not be important for any purpose, *Hudson v. Stillwell*, 80 Ark. 575, 98 S. W. 356.

Sec. 18. Tacking titles. The adverse possession of an heir, may be added to the adverse possession of his ancestor in making up the statutory period, *Kilgore v. Kirkland*, 69 S. C. 78, 48 S. E. 44. One who desires to tack his possession to that of a prior tenant must show a transfer or attempt to transfer to him the prior right or claim, *Holdrege v. Livingston*, (Neb. 1907) 112 N. W. 341. When a man holds land by a deed duly recorded, his grantee may tack his possession to his own to make a foundation for a title by adverse possession, *Roberson v. Downing Co.*, 120 Ga. 833, 48 S. E. 429. Where the title to a small piece of land is claimed on the ground of long adverse possession, the owner cannot tack his title on to the title of his grantor to make title by prescription unless his deed includes the piece of land in question, *Jennings v. White*, 139 N. C. 23, 51 S. E. 799. "When a husband has entered into possession of a tract of land under a void deed, and is asserting title in such a manner as to have the benefit of the occupying claimant's law and the statute relating to title by prescription and, while the statute is running in his favor, conveys to his wife, he cannot interrupt the running of the statute in her favor by buying in the legal title unless he asserts that title to the same effect that his grantor would be required to do," *McPherson v. McPherson*, (Neb. 1906) 106 N. W. 991. When a judge instructed the jury that "if defendants or either of them, or those from whom or under whom they claim possession, have been in the actual adverse and continuous possession of the land they claim as against the plaintiff, and all others, openly claiming to a well defined and marked boundary for as long as 15 years consecutively—they should find for the defendants": the word "and" should have been used in place of "or" and the defendants were entitled to add to their possession the possession of those under whom they claimed, for the purpose of extending the possession as far back as it might be. The adverse holding may have commenced when the first person under whom they claim entered upon the land, *Hughes v. Owens*, (Ky. 1906). 92 S. W. 595. Tacking by widow on possession of deceased husband, *Larson v. Anderson*, (Neb. 1905) 104 N. W. 925.

Sec. 19. Conveyance of land in adverse possession of another—Champerty. A deed of land is void as against one in adverse possession at the time of its execution, *Doe v.*

Edmondson, 145 Ala. 557, 40 S. 505. The champerty statute does not apply to sales made under orders of court, *Cook v. Burton*, (Ky. 1906) 92 S. W. 322. A conveyance made by the purchaser at an execution sale while the debtor is in possession, is valid because the debtor's possession cannot be adverse, *Sellers v. Farmer*, (Ala. 1907) 43 S. 967. A deed of land which has been in the actual possession of another under a claim of ownership for more than 20 years is void for champerty, *Lost Creek Coal Co. v. Napier's Heirs*, (Ky. 1905) 89 S. W. 264. A contract by a husband to sell standing timber belonging to his wife and children was not champertous since he and his wife and children were living together on the land and the possession of the wife and children cannot be said to be adverse to his, *Barnes v. Chair Co.*, (Ky. 1905) 89 S. W. 222. "One who is in possession of land as a purchaser from an infant does not hold adversely to the infant within the meaning of the champerty statute, and his possession does not render void a conveyance by the infant to another after he arrives at age," *Smith v. Cornett*, (Ky. 1906) 98 S. W. 297.

Sec. 20. Of public property. No title to any public street or grounds is to be acquired by adverse possession, Mich. Acts 1907, No. 46. Title to school lands may not be acquired by adverse possession, *Murtaugh v. Chicago, M. & St. P. Ry. Co.*, (Minn. 1907) 112 N. W. 860. Although a company had used a strip of tide lands since 1889 it was not entitled to claim title by adverse possession as a municipality can not lose title to a street by adverse possession, *Town of Seattle v. West Seattle Land Co.*, 38 Wash. 359, 80 Pac. 549. The defendant had entered on certain lands, and he held possession of the premises adversely to all the world, except the State of Washington, for more than 10 years. This was insufficient to make title by adverse possession, and a previous holder of a donation land claim would have a right to an action of ejectment, *Yesler Estate v. Holmes*, 39 Wash. 34, 80 Pac. 851.

If the evidence shows that a tract of land with certain known and visible boundaries has been held for 30 years in possession adverse to the state, a grant by the state is presumed, *Bullard v. Hollingsworth*, 140 N. C. 634, 53 S. E. 441.

Sec. 21. In highway—Over railroad. Under the act

of 1872 (Pol. Code 1895 s. 678), the title to a private way was acquired by seven years use by the public, when those using the road kept it in repair, *Kirkland v. Pitman*, 122 Ga. 256, 50 S. E. 117. Where the boundary lines of a road have never been established by any competent authority, but the right of the public to travel over such road has been established by continuous usage, the width of such road is determined by the width of such use. And immemorial fence lines of adjoining property owners will overcome any legendary opinions as to where the lines were primarily intended to be, *Anderson v. Huntington*, (Ind. 1907) 81 N. E. 223. Where the testimony shows that a railroad company has a fee simple title to the land over which a street or right of way has been claimed, but has not been acquired by either the public or the defendant who claimed adverse use, a temporary injunction will be made permanent and the defendant be enjoined from further proceedings to assess compensation for the taking and obstruction of the alleged right of way abutting on the land of the defendants, *Charleston & W. C. R. Co. v. Garlington*, 74 S. C. 161, 54 S. E. 208.

In Kentucky neither a private individual nor the public can acquire by adverse user an easement in the nature of a passway along or across a railroad right of way. But title can be gained as against a railroad by adverse possession for the statutory period, *Louisville & N. Ry. Co. v. Smith*, 31 Ky. Law Rep. 1, 101 S. W. 317.

ALIENS

Escheat of lands held by aliens, see *post* §140.

Sec. 22. Statutory disabilities of aliens to hold real estate. In New York lands inherited in 1876 by a non-resident alien from a naturalized citizen, who took by purchase, could not be inherited in 1888 from the non-resident alien by his nearest descendant, who was also a non-resident alien, *Stewart v. Russell*, 184 N. Y. 601, 77 N. E. 983. Tennessee Acts 1875 p. 4, c. 2, allowing aliens to acquire, hold and dispose of real estate and repealing prior statutes as to escheat construed in *Kiernan v. Casey*, 116 Tenn. 245, 93 S. W. 576. The Constitution of the State of Washington, Sec. 33, Art. 2, provid-

ing that all conveyances made to aliens shall be void, rendered aliens holding lands liable to have the property escheat to the state if proper proceedings were begun during the life time of the aliens; but after their death their heirs, taking the property by inheritance, held a valid title to the property, *Abrams v. State*, (Wash. 1907) 88 Pac. 327. Although Washington Const. Rrt. 2, s. 33, prohibits the ownership of land by an alien yet he may purchase valuable deposits of limestone, silica, silicated rock or clay and he may hold other land necessary to develop the same, *State ex. rel. Atkinson, Atty Gen. v. Evans*, (Wash. 1907) 89 Pac. 565.

ASSIGNMENTS AND BANKRUPTCY

Sec. 23. Assignments for creditors. Kentucky Statutes 1903, sections 85 to 87, inclusive, as to the sale of land in voluntary assignment proceedings and the debtor's rights to exemptions therein, construed, *Maupin v. Maupin's assignee*, (Ky. 1905) 89 S. W. 238. Kentucky Statutes 1903, section 75, as to assignments for the benefit of creditors, construed, *Lexington Co. v. Columbia Co.*, (Ky. 1906) 98 S. W. 332. A judgment against one who has made an assignment for the benefit of creditors, entered during the insolvency proceedings, becomes a lien upon the reversionary interest of the assignor in the property assigned, *Northwestern Mutual Life Ins. Co. v. Murphy*, (Minn. 1908) 114 N. W. 360. Where an assignee for benefit of creditors sold property to a purchaser with a guaranty that at the buyer's option he would furnish a person to rebuy it at the price paid, and being called on to furnish such a person bought the property himself, while still assignee the creditors could avoid the sale, *Nabours v. McCord*, (Tex. 1907) 100 S. W. 1152.

A conveyance of all a debtor's estate in payment of the grantee's debt to the exclusion of other creditors operates as an assignment for all under Alabama Code 1896, section 2158, *Locke v. Martin*, 145 Ala. 274, 40 S. 387. Creditors who did not formally assent to a conveyance by a debtor for the benefit of all creditors which contained a reservation to him of certain lands, but accepted the benefits thereof by receiving their pro rata share of dividends paid out of the proceeds of

the property conveyed, are estopped to proceed against the reserved lands, *Royster v. Heck*, (Ky. 1906) 94 S. W. 8. An insolvent debtor may in good faith mortgage the whole of his property to secure the payment of one or more bona fide debts due to preferred creditors, and such a mortgage is not void under Florida Rev. St. 1892, section 2307, as being an assignment for the benefit of creditors attempting preferences, if at the time it is made the debtor in good faith intended it to be only a security for the debt therein provided for, and had no design or intention at the time of thereby absolutely surrendering the dominion, control and ownership over the property, or of making a general assignment for the benefit of his creditors generally, *Wylly-Gabbett Co. v. Williams*, (Fla. 1907) 42 S. 910. Where property assigned for the benefit of creditors is sold by a commissioner appointed by the court in a suit of partition, the trustee named in the deed of assignment is not entitled to a commission of 5 per cent. upon the fund passing through his hands as trustee from the sale of this property, under a provision in the deed entitling him to commissions for a sale, *Wilson v. Langhorne*, 105 Va. 64, 52 S. E. 841.

A debtor made an assignment and later with the consent of the assignee and creditors conveyed a certain portion of his land to his wife for life, remainder to her children. Creditors were then notified to prove their claims but although the husband of one of the debtor's daughters held a claim against him he did not prove it and later after the death of the debtor's wife her children entered and occupied the land. By estoppel the husband's claim was thus barred as a lien on the land, *Estill's Trustee v. Francis*, (Ky. 1905) 89 S. W. 172.

Reversion to assignor. A deed of assignment of all his real and personal property (except such as was exempt under the homestead laws) was made by a debtor for the benefit of his creditors, with the provision that if there was a surplus after the payment of debts, it should be returned to the assignor. Thereafter and before any steps were taken by the assignee to execute the trust, the debtor effected a compromise with his creditors. When the assignor satisfied the indebtedness there was no duty to be performed by the assignee and by operation of law the assignor again became possessed of the legal title, *Early v. Early*, 75 S. C. 15, 54 S. E. 827.

Sec. 24. Federal bankruptcy—Fraudulent conveyances. Under §67 f of the bankruptcy law of 1898 property which has been attached within four months of the filing of the petition and which the bankrupt has contracted to convey to others may be preserved for the general benefit of the estate, *First National Bank of Baltimore v. Staake*, 202 U. S. 141. A decree setting aside a conveyance of land by one holding in trust for a bankrupt on condition that the trustee pay the amount actually paid by the purchaser, and otherwise confirming the sale is valid, *Weatherwax v. Gorman*, (Mich. 1907) 113 N. W. 1105. The holder of a note containing a waiver of homestead has no remedy at law, pending bankruptcy proceedings, but must enforce his rights in a court of equity, *Hudson v. Lamar, Taylor & Riley Drug Co.*, 121 Ga. 835, 49 S. E. 735.

Fraudulent conveyances. The trustee may maintain a bill to set aside a fraudulent conveyance, by a bankrupt, of his property, more than four months prior to the adjudication, *Beasley v. Coggins*, 48 Fla. 215, 37 S. 213. A trustee's right to set aside a fraudulent conveyance of real estate depends solely upon whether it was a fraud upon those who were creditors at the time it was made, *Treseder v. Burgor*, 130 Wis 201, 109 N. W. 957.

Under section 70 E of the U. S. Bankruptcy Act of 1898 the trustee in bankruptcy is clothed with plenary power to sue to avoid any transfer made by the bankrupt of his property which any creditor may have avoided, whether made within four months prior to the adjudication of bankruptcy or not, *Sharp v. Fitzhugh*, 75 Ark. 562, 88 S. W. 929.

BONA FIDE PURCHASERS

See Vendors and Vendees.

BOUNDARIES

Boundaries described in deeds, see *post* §79; in wills, see *post* §642.

Evidence as to boundaries see further *post* §159.

Boundaries of mining locations, see *post* §352.

See Plats and Surveys.

Sec. 25. Agreements fixing—Oral agreements. Evidence was held to show that the parties to a boundary dispute had in fact agreed upon a division line, *Morgan v. Lewis*, (Ky. 1907) 99 S. W. 676. When in a boundary dispute the evidence showed that in 1877 a certain line was agreed on as the true dividing line and that the parties for twenty-five years thereafter had been in actual occupation according to the agreed line the agreement was enforced by the court, *Berry v. Evans*, (Ky. 1905) 89 S. W. 12. Where a devise of land was indefinite and the devisee helped a surveyor survey his tract, containing 54¾ acres, and twenty-seven years later conveyed it and 21 acres in addition, stating that he received this under the will, it was also held that the recital in the deed was insufficient to overthrow the presumption that the survey gave the devisee all he was entitled to, *Shive v. Garman's Guardian*, 30 Ky. Law Rep. 1368, 101 S. W. 300. The plaintiff cannot prove by her husband acting as her agent that there was a dispute between herself and the adjoining owner now dead as to the boundary and that thereupon the owner and herself agreed upon a line and caused it to be surveyed, *Hollingsworth v. Barrett*, (Ky. 1905) 89 S. W. 107. When the husband of an owner entered into an agreement with an adjoining owner for the establishment of a disputed boundary and thereafter the husband and wife occupied the land in accordance with the agreement, the wife by so doing ratified the agreement even although she did not authorize her husband originally to enter into it upon her behalf, *Matthews v. French*, 194 Mo. 553, 92 S. W. 634.

When a grantor has run a boundary line for his land and points it out to the grantee, and sells "bounded by land of B," then the true boundary line and not the line shown grantee is the real boundary when there is any difference between them, *Hall v. Davis*, 122 Ga. 252, 50 S. E. 106. Where parties to a boundary dispute did not agree orally upon an indefi-

nite or unascertained line or one that was in dispute, but measured with no other intention than to establish the true line, and by mistake, supposed the true boundary was in a different place from where it in fact was; it was held that they had not entered into a binding agreement, *Sonnemann v. Mertz*, 221 Ill., 362, 77 N. E. 550; *Purtle v. Bell*, 225 Ill. 523, 80 N. E. 350.

A written agreement of compromise executed between parties to a boundary dispute fixing the exact boundary is admissible although never recorded or acknowledged, *Samples v. Smyth*, (Ky. 1907) 98 S. W. 1047.

The government surveyor "flagged" the boundary line between two homestead claims and the owners of the claims signed an agreement that as there was a controversy concerning the boundary the line should be considered to be a fence more than ten chains from the boundary line as "flagged," but both parties knew the real boundary line, and this agreement was not valid although that remained the boundary line for a period equal to that fixed by the statute of limitations without protest, *Lewis v. Ogram*, 149 Cal. 505, 87 Pac. 60.

Oral agreements. An oral agreement is insufficient to change the boundary line marked by a fence and acquiesced in for 15 years, *Uker v. Thieman*, 132 Ia. 79, 107 N. W. 167. Conduct of owner of land held to show that the fence between him and adjoining owner was not regarded by him as true boundary, but that a line fixed by parol was such, *Kitchen v. Chantland*, 130 Ia. 618, 105 N. W. 367. It was held that an oral compromise of a suit as to boundaries of adjoining owners made by the parties going on the land and drawing a division line was not contrary to public policy and was binding, *Martin v. Conley*, (Ky. 1907) 99 S. W. 613. When an alleged oral agreement in settlement of a boundary dispute was not made in consequence of a dispute between adjoining owners, and there was no doubt as to whose title was superior, no mutual concession, and no marking of a distinct line, the court refused to enforce it, *Amburgy v. Burt & Brabb Lumber Co.*, (Ky. 1905) 89 S. W. 680. When a road has crossed land so that there were triangular pieces on each side of a road belonging to two owners, an oral agreement by them to exchange the land on each side of the road was void when there was no dispute concerning the boundary lines, and a title was not acquired by adverse possession although the boundary stones

and fences were changed provided the taxes were paid according to the original description of the farms and not according to the new division made by oral agreement, *Mann v. Mann*, (Cal. 1907) 91 Pac. 994. A parol agreement between owners of adjoining lands to employ a surveyor at their joint expense to survey and establish the boundary, followed by such a survey and the marking of the line and the building of a fence thereon by one party, amounts to an agreement for the settlement of an undetermined boundary which will give such person a right to recover in ejectment to such line, in spite of the fact that the predecessors in title of both parties had recognized a different line as the boundary for many years, *Roberts v. Birks*, 223 Ill. 291, 79 N. E. 103.

Sec. 26. Fences—Acquiescence—Adverse possession.
See *Ante* Adverse Possession.

As to fences, see further *post* §§177-180.

Fences on railroad right of way, see *post* §§179-180.

A buyer who is put into possession under certain boundaries cannot avail himself of any ambiguity in the deed, the contemporaneous construction thereof being binding, *Como v. Pointer*, 87 Miss. 712, 40 S. 260. In the absence of adverse possession and the application of the statute of limitations the fact that a wrong boundary line is pointed out to a purchaser by the vendor will have no effect on the title, *Turner v. Angus*, 145 Mich. 679, 108 N. W. 1100. A water company made arrangements to supply water to land which it had re-surveyed by its private surveyor as the government boundaries had been obliterated. A. entered his land after the boundaries as shown by the private survey had been pointed out to him, and B. entered his land likewise believing that the boundaries as established by the private surveyor were the correct boundaries, and A. and B. subsequently erected a boundary fence between their land. Although the boundary made by the private surveyor was not the correct boundary, A. and B. were nevertheless bound thereby as they both bought under the direction and guidance of the Water Company, *Taylor v. Reising*, (Idaho, 1907) 89 Pac. 943.

Where parties have acquiesced in a fence as the true boundary line for more than 20 years it will be regarded as such in spite of the fact that a survey was made without any binding agreement that its results should be followed, *An-*

draws v. Meredith, 131 Ia. 716, 109 N. W. 287. If a fence has only been erected a short time before it is discovered that the boundary line it marks is not correct, it cannot be regarded as establishing a boundary line by acquiescence, *Cottrell v. Pickering*, (Utah 1907) 88 Pac. 696.

A hedge, which, for 25 years, has been recognized as the boundary between two estates, cannot thereafter be denied to be such by either owner, *Watson v. Hogan*, 130 Ia. 350, 106 N. W. 759. "Fences of long standing, erected upon what parties have called the true line, and up to which they have improved and cultivated, are better evidence of the true line than surveys made after the monuments have disappeared," *Break-ey v. Woolsey*, (Mich. 1907) 112 N. W. 719. When two land-owners built a division fence between their property on what they believed to be the correct line, a change could not be made after 24 years although the locations were proved incorrect, *Lindley v. Johnston*, 42 Wash. 257, 84 Pac. 822. When tenants have constructed a fence between adjoining properties and such fence remained the boundary for more than thirty years, it became the correct boundary, although a later survey showed that it was not on exactly the right line, *Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009. The owners of a strip of land adjoining a fence which, for 40 years, was regarded as the true line, will not be permitted to deny that the fence was on the line, as against the purchaser of lands on both sides of the fence, who has developed a mine through shafts in the strip without objection on their part, even after they became aware that the fence was not on the true line, *Cleveland-Cliffs Iron Co. v. Gauthier*, 143 Mich. 296, 106 N. W. 862.

Sec. 27. Proceedings to establish boundaries—Evidence. The land court is given jurisdiction of petitions to determine the boundaries of lands or flats adjacent to or covered by high water by Mass. Acts 1906, Ch. 50. Hurd's Illinois Rev. St. 1905, p. 1984, c. 133, providing for the settlement of boundary disputes by means of commissioners whose report is subject to the approval of the court is not unconstitutional because it denies a trial by jury, *Wood v. Tharp*, 228 Ill. 244 81 N. E. 861. Hurd's Illinois Rev. St. 1905, c. 54, section 7, as to the settlement of boundary disputes by town fence viewers, construed, *Hill v. Tohill*, 225 Ill. 384, 80 N. E. 253.

Where as a result of a boundary dispute the plaintiff is deprived of the full width of his lot, equity has no jurisdiction, the legal remedy being adequate, *Livingston Co. Bldg. Ass'n v. Keach*, 219 Ill. 9, 76 N. E. 72. The fixing of parish boundary lines is legislative but where there is a dispute as to the meaning of a statute defining such a boundary the courts have jurisdiction. A suit to determine its meaning may be brought in either parish, *Parish of Caddo v. Parish of De Soto*, 114 La. 366, 38 S. 273, 114 La. 370, 38 S. 274. Code Civ. Proc. 51982 relating to an alteration in an instrument referring to a boundary line was construed as allowing a correction of a number "11" when it was inserted so as to appear as though it were "41", and the change back to "11" did not invalidate the instrument, *Manuel v. Flynn*, Cal. 1907) 90 Pac. 463. Under Sec. 2396 and 2397 Rev. St. U. S. the division line between the halves of a quarter section should be drawn from a point at the centre of the north line to one at the centre of the south line, *Hootman v. Hootman*, 133 Ia. 632, 111 N. W. 60.

Evidence. An illegal survey is no evidence as to boundary, *Phillips v. Hink*, (S. D. 1908) 114 N. W. 699. The evidence of a deceased disinterested person in regard to a boundary line is admissible, even when the person testifying to the evidence given by the deceased is an interested party. See Sec. 590 of the Code, *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782. Where mutual deeds are given to establish a division line between adjoining owners one who was present when the line was run can testify as to the location of objects contained in the description, *Ball v. Loughbridge*, (Ky. 1907) 100 S. W. 275. In a dispute over a corner boundary it appeared that previously a county court had appointed processioners to establish the obliterated corner. They were old people since deceased and therefore as a line of public survey may be proved by reputation the county surveyor who was present at the processioning could testify as to what the old people told him at that time as to the location of the corner, *Phillips v. Stewart*, (Ky. 1906) 97 S. W. 6. The marking of a tree or the placing of a stone at the time of surveying the junior grant of land, to mark the end of the call for the senior grant, could have no other force and effect than the declaration of the surveyor that such marked tree or stone was in the line; and in absence of evidence that the surveyor was

dead such declaration is incompetent, *Hill v. Dalton*, 136 N. C. 339, 48 S. E. 784.

Evidence concerning the general reputation of a boundary line by a witness, is admissible when he said that according to such reputation it ran along the top of a ridge, *Hemphill v. Hemphill*, 138 N. C. 504, 51 S. E. 42. When land has reverted to the state and under the act of 1840 a new grant is made, the grant is correct when it describes the lot by the original description and by the old county name, although a new county has been created, and the courts are bound to accept it in evidence, *Stanford v. Bailey*, 122 Ga. 404, 50 S. E. 161. A grant from the state of public land "beginning at a pine on the east side of a gum swamp" is sufficiently definite to admit parol evidence to show where the beginning is, *Broadwell v. Morgan*, 142 N. C. 475, 55 S. E. 340. A deed described land as bounded on the west by Main street which, in a plat referred to in the deed was stated to be 66 feet wide. For many years the street had been regarded by the abutting owners as 86 feet wide, and at the time the deed was delivered the owner stated to the grantee that such was the fact. Held, The declarations of the grantor, being for the purpose of settling the street boundary, were admissible, *Rix v. Smith*, 145 Mich. 203, 108 N. W. 691.

Sec. 28. Highways as boundaries. A deed of land "beginning in the east line of the road" then around the lot to the east end "thence southerly by the sea to a road or pass-way" and "thence northerly in the east line of said road * * * to the point of beginning," does not include the road, *Hamlin v. Atty. General*, 195 Mass. 309, 81 N. E. 275. A railroad right of way is not a public highway in the sense of a public street within the rule of construction as to deeds and therefore a deed which mentions such a right of way as a boundary does not convey the land between the edge of the right of way and the railroad track, *Couch v. Texas & P. Ry. Co.*, (Tex. 1906) 90 S. W. 860.

Title to centre. A deed which calls for the line of a private road as a boundary of the tract by it conveyed, and which gives to the grantee the right to open and use such road, does not pass to the grantee the title in fee to any part of the road, *Clayton v. Gilmer County Court*, 103 W. Va. 253, 52 S. E. 103. Where the owner of an island in the St. Law-

rence River laid out lots and streets, one of the lots running along the river, a deed of a lot abutting on the street "as laid out on the map—126 feet front and 68 feet deep, supposed to contain 60 by 100 feet, the same more or less" gave the grantee a fee in the whole street subject to the public easement of travel thereon, *Johnson v. Grenell*, 188 N. Y. 407, 81 N. E. 161. Where the grantors and the grantee in a deed which conveyed land abutting on a private way were the owners in common of the fee of the private way and the deed recited that the premises were the same as those conveyed by an earlier deed wherein they were described "as on the * * * side of the private way" the deed conveyed to the grantee only the land on the side of the way, *Gray v. Kelley*, 194 Mass. 533, 80 N. E. 651. A deed given to secure a partition among heirs of all of the real estate of a decedent which contains the following phrases of description: "Beginning at a stake by the fence on the crossroad leading to Harlem," and thence around the lot "to the public road; thence south along the road to the place of beginning;" and another "at the corner of a field at the junction of the Bloomingdale Road with the cross-road that leads to Harlem; thence running along the Bloomingdale Road south;" passes the title to the middle of the public highways mentioned. The case contains a valuable discussion of the authorities, *Van Winkle v. Van Winkle*, 184 N. Y. 193, 77 N. E. 33.

Sec. 29. Streams and waters as boundaries.

Accretion by change of river used as boundary, see further *post* §612.

Where a river is designated as the boundary its shore controls courses and distances in the description, *Board of Park Com'rs v. Taylor*, 133 Ia. 453, 108 N. W. 927. Where a course in a deed ran "to the Sandy river; thence up said river with its meanders to the beginning," it conveyed the land to "the Main Channel or middle of the river," *Huffman v. Charles*, (Ky. 1906) 97 S. W. 775. Where the owner of land on both sides of a creek conveyed one side by a deed in which the boundary is described as the centre of the creek and the other by a deed describing the boundary as the bank of the creek, both grantees owned to the centre or thread of the stream. If, during the long period of time since intervening, the thread was gradually changed, the boundaries of the

respective grantees have changed with it, *Spurrier v. Hodges*, (Ky. 1906) 90 S. W. 559. In establishing a boundary courses and distances must give way to natural objects and therefore where one of the calls in a survey of a patent was "to a stake in Poor Creek; thence, running up the same" and the next was "thence, running up the same" the water-course constituted one of the exterior lines of the survey and the calls must be run with the water-course, *Bramlette v. Howard*, (Ky. 1906) 93 S. W. 902.

Under the grant in 1686 from the King of England through the Royal Governor of a charter to the City of New York it took the land on Manhattan Island between high and low water mark for the benefit of the public as a delegation of governmental power, so that a later conveyance by the city to a private person of a tract described as bounded on the Hudson river passed title only to high water mark. *Re Mayor, etc., of City of New York, Riverside Park In Re* 182 N. Y. 361, 75 N. E. 156.

When an act of sale describes the land as 4 arpents front by 40 deep, fronting on a stream, *prima facie* the intention is that whatever be the amount of land sold it shall front on the stream. When the seller after this sale conveys another tract 15 arpents front on the same stream by 40 arpents being all of the plantation, except that sold to the first vendor, the second purchaser takes only what remains after the rights of the first purchaser have been satisfied. As it appeared, however, that there was much ambiguity in the language of both acts of sale the court sent the case back for further proceedings with instructions for both parties to have leave to introduce additional evidence, *Bergeron v. Daspit*, 119 La. 9, 43 S. 894.

The boundary line between the parishes of Caddo and De Soto is the thread of the stream known as Bayou Pierre, *Caddo v. De Soto*, 119 La. 120, 43 S. 978. The boundary between the parishes of Red River and Caddo, Louisiana, as described in Act No. 70, p. 108, Louisiana Laws 1878 is straight and does not follow the meanders of Cannisnia Lake, *Parish of Red River v. Caddo*, 118 La. 938, 43 S. 556.

Sec. 30. Locating lost boundaries. The location of a government monument which has been obliterated may be established by any proper parol evidence, *Reed v. Burrell*, (Neb. 1906) 108 N. W. 155. Evidence that lost corners were es-

established by plaintiff's surveyor in accordance with U. S. Rules governing public lands held admissible, *Nystrom v. Lee*, (N. D. 1907) 114 N. W. 478. When re-establishing the lines of government land, the original field notes are conclusive and the survey should be started from the original monument if found and all other corners located in accordance with the field notes of the first survey, even if such survey were inaccurate, *Washington Rock Co. v. Young*, 29 Utah 108, 80 Pac. 382.

The government monuments bounding a piece of land were lost, and the court ruled that the correct procedure was to have a survey by a commissioner who should start from the government post remaining and relocate the land following the field notes of the government survey and such relocation was valid although if the old government posts had been found the boundary as marked by them would have been the proper boundary to follow, although it were discovered to be incorrectly placed, *Strunz v. Hood*, 44 Wash. 99, 87 Pac. 45. When in a controversy over the title to land, dependent upon the location of a disputed boundary line, there are no monuments at the points in dispute, and these points cannot be located by measurements from known and undisputed corners of the tracts between which the line is, so that to render a verdict for either party the descriptions of the deeds must be departed from in respect to length of lines, a verdict supported by testimony of a witness, who swears he saw the monument called for at the points fixed by the verdict as corners, and the evidence of the acts of recognition by owners on both sides of the line, cannot be disturbed, *Stewart v. Doak*, 58 W. Va. 172, 52 S. E. 95.

Sec. 31. Monuments, courses, distances and area. If the "prolongation of a line considered as a straight line," would render the courses and monuments by which another line is described inaccurate, it may be held to consist of several angles making the meaning of other parts of the deed more consistent, and the circumstances surrounding the execution of the deed are to be taken into consideration, and if there is any ambiguity the deed must receive the construction most favorable to the grantee, *Chapman v. Hamblet*, 100 Me. 454, 62 Atl. 215.

Monuments govern. In determining the boundaries of

full and fractional sections the original monuments control over all other evidence, including plats and field notes, *Propper v. Wohlwend*, (N. D. 1907) 112 N. W. 967. In a deed one of the boundaries was a party wall but although there was a discrepancy in the described width of the lot, the title to the land extended only to the centre of the party wall, as monuments when given always govern distances, *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135. Where a deed is construed, containing disagreements between the monuments and marked lines, and the magnetic courses, the conduct and intention of the parties are to be considered as well as the circumstances surrounding the execution of the deeds, *Casto v. Baker*, 59 W. Va. 683, 53 S. E. 600. Where one sued in ejectment alleging title to a tract of land under a grant from the state, and one of the boundaries called for a course and distance to a stake on a certain line, the natural object called for would control the boundary, *Moore v. McClain*, 141 N. C. 473, 54 S. E. 382. Where in a case of disputed boundaries "a pine at J. B's corner was the starting point, it was held, that where a natural boundary was called for in a patent or deed, the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance specified, *Hill v. Dalton*, 139 N. C. 640, 52 S. E. 273. When in a boundary dispute it appeared that all the monuments mentioned in a certain deed had disappeared except one it was proper to take as the true line a survey made much later beginning at the only remaining monument and following by reverse courses the distances and courses mentioned in the deed, *Cahill v. Mullin*, (Ky. 1906) 97 S. W. 370. Where a deed has erroneously made the length of one boundary of a piece of land $10\frac{1}{2}$ perches instead of $19\frac{1}{2}$ and the subsequent deeds in the chain of title have all made it $10\frac{1}{2}$ perches referring back by a clear chain of title to the deed with the correct description, the owner has a sufficient title to compel specific performance of an agreement to purchase the whole property when he and his predecessors have kept the land fenced in and have actually occupied the full $19\frac{1}{2}$ perches, *Newbold v. Condon*, 104 Md. 100, 64 Atl. 356.

If the black oak and dogwood trees called for as monuments in a deed are gone the course and distance called for must govern, *Mays v. Hinchman*, 57 W. Va. 602, 50 S. E. 823. Evidence considered as to boundaries in an action to quiet

title and it was held, there being no marks found on the ground, that "course and distance must control," *Lewis v. Louisville & N. R. Co.*, (Ky. 1907) 99 S. W. 658.

Courses govern distances. Where three corners in a patent designated by stakes were lost and if the calls were followed strictly the lines would never meet it was held that "as the rule is to sacrifice distance, as being the least important, it would not do to discard any course so long as by altering distance only the survey can be made to close, leaving all identified corners intact. It was therefore error to alter the call of the patent as to its course, as, by shortening the distances of the doubtful lines in equal proportions, all the courses would be maintained," *Morgan v. Renfro*, (Ky. 1907) 99 S. W. 311.

Area. It was held that a grantee in a deed which calls for 75 acres cannot as against a subsequent innocent purchaser without notice from the vendor "extend his calls over any land his vendor owned at the date of his deed until his acreage is made good." As his boundary called for a "well marked and established line" he is limited thereto, *Young v. Duggin*, (Ky. 1907) 99 S. W. 655. The calls for courses and distances in a patent, whereby it will cover about 100 acres more than it calls for, prevail over the call for a stake in the boundary of another patent which involves the extension of the patent so as to cover over 600 acres more than it calls for, *Mathews v. Pursifull*, (Ky. 1906) 96 S. W. 803.

Sec. 32. Erection of bounds. Mass. Rev. Laws, Chapter 48, section 104, as to the erection of permanent bounds "at the termini and angles of all ways laid out" by county or city officials, construed, *Harvey v. Easton*, 189 Mass. 505, 75 N. E. 948.

BROKERS

Sec. 33. Statutes requiring written authority—Sufficiency of authority—To Exchange—Exclusive Authority.

Statutes requiring written authority. Effect of. N. Y. Laws 1901, p. 312, c. 128, Pen. Code, section 640d, making it a misdemeanor for any person in a city of the first or second class to offer land for sale without the written authority of

the owner is unconstitutional, *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 79 N. E. 836. An offer by one real estate broker to another of a commission if he procured a purchaser on certain terms, being in writing was not in conflict with Burns Indiana St. 1901, section 6629-A which declares no contract for a commission valid unless signed in writing by the owner or his legally appointed and duly qualified representative, *Provident Trust Co. v. Darrrough*, 168 Ind. 29, 78 N. E. 1030. A violation of the provisions of a statute (*Laws 1903*, p. 161) forbidding the offering of real estate for sale without the written authority of the owner does not prevent the enforcement of a contract made in violation of the statute but ratified by the owner, *Mercantile Trust Co. v. Niggeman*, (Mo. 1906) 96 S. W. 293. If a contract of agency for the sale of real estate is void because not in writing the brokers may not recover the value of their time consumed in finding a purchaser, *Barney v. Lasbury*, (Neb. 1906) 107 N. W. 989.

Exchange. An agent with merely parol authority may bind his principal by a written contract for the exchange of lands, *Hopper v. McAllum*, 87 Miss. 441, 40 S. 2. A written contract with a broker for a sale of property may be superseded by a parol agreement for an exchange, and the latter, when executed, will be upheld, *Lucas v. County Recorder of Cass County*, (Neb. 1905) 106 N. W. 217.

Sufficiency of authority given. Where a real estate agent signs a formal contract to sell land at a certain price, on behalf of his principal, the latter is not bound by the contract although he told the agent he would sell at the price if the principal had not expressly authorized the agent to bind him by signing a contract, *Brown v. Gilpin*, (Kan. 1907) 90 Pac. 267. Letters from the owner of land offering it for sale and agreeing to pay brokers a commission do not authorize them to make a binding contract with a purchaser, *Larson v. O'Hara*, 98 Minn. 71, 107 N. W. 821. An auctioneer of real estate cannot without further authority than that which comes from his position as auctioneer bind the parties by a memorandum of any other contract than that which was actually made, *Kelley v. Holbrook*, 191 Mass. 565, 77 N. E. 1037. If a written authority to sell two tracts of land is granted to an agent at a stipulated price for both lots, he may sell one tract to a purchaser, and then, with the verbal assent of his principal, he may sell the other tract, provided the combined price

is as much as the price for the two tracts as originally given, and if it is within the period of the agent's authority to sell, *Campbell v. Beard*, 57 W. Va. 501, 50 S. E. 747.

Oral authority to an agent for an intending purchaser to use his principal's name in a contract for the purchase of land does not authorize the agent to sign his principal's name to a note and mortgage and such a contract cannot be made to bind the seller because the principal by bringing suit for specific performance tries to ratify it, *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322.

Oral agreement. As to the application of the statute of frauds to real estate brokers, see *post* §§507-511. When an executor of an estate promises to pay a broker a commission for the sale of property belonging to the estate, it is not within the statute of frauds and the contract imposes on him personal liability so he may be sued for a commission by the real estate broker, *Reynolds-McGinness Co. v. Green*, 78 Vt. 28, 61 Atl. 556.

Exclusive authority. A sale at auction is not a breach of contract giving a broker the exclusive sale of premises, *Ingold v. Symonds*, 134 Ia. 206, 111 N. W. 802.

Sec. 34. Ratification—Estoppel. A deed from an agent, which was bad at law because not properly acknowledged and executed if the agent was without proper authority, could be specifically enforced as the owner's contract to sell when he had ratified the agent's acts, *Kirkpatrick v. Pease*, (Mo. 1907) 101 S. W. 651. A real estate broker executed a contract for the sale of certain property on the oral authority of his principal, but the purchaser had a right to specific performance when the owner's manager ratified the contract and directed the agent to transmit the deposit, notwithstanding Sess Laws 1905, p. 110, c. 58. The purchaser was also put into possession but the previous ratification was sufficient, *Roberts v. Hilton Land Co.*, (Wash. 1907) 88 Pac. 946. In a case instituted for the purpose of compelling specific performance, a railroad company employed an agent to procure for it options on certain properties, for which service the agent was to receive a fixed compensation per day; acting in this capacity the agent took an option on certain property owned by the plaintiffs under an agreement with them to pay him a commission. The company accepted the option in writing, but before

the execution of the deed discovered the duplicity of the agent, dissolved the relations existing between him and the company, who took from the agent an assignment of all commission contracts taken by him, and also entered into negotiations with the plaintiffs, with a view of obtaining a contract more favorable to the company, failing which it refused to comply with the terms of the option. The right to disaffirm was waived by the company when, after the discovery of the agent's agency for both parties it took an assignment of the commission contract and neglected to notify the plaintiffs of its refusal to be bound by the contract, *Truslow v. Parkersburg*, 61 W. Va. 628, 57 S. E. 51.

An owner gave a written authority to a real estate firm to sell his land at a certain price, but before the time when the authority expired he sent a messenger to revoke it and demand the return of the written authority. The real estate agent had in the meantime completed the contract orally, and, subsequently signed an agreement to sell the land in his own name as agent for the owner, which was sufficient to satisfy the statute of frauds. Subsequently, a deed and a check for the amount named were presented to the owner, and he said he would come over in the morning and sign the deed, ratifying his agent's act, and a decree of specific performance was granted, *Brandon v. Pritchett*, 126 Ga. 286, 55 S. E. 241.

When an agent of a creditor is authorized to foreclose a mortgage on land and to secure a settlement of the indebtedness, and the agent, instead of foreclosing the mortgage, takes a conveyance of the land to his principal, with an agreement that the rents from the land are to be applied to the debt, and that the land will be reconveyed to the debtor when he pays the debt, and the creditor accepts and retains the conveyance, he does so subject to the conditions that properly render it a mortgage, especially when the consideration for the conveyance was only the principal of the unpaid debt, *De Bartlett v. De Wilson*, (Fla. 1906) 42 S. 189. An agent sold land of his principal on credit although authorized to sell only for cash. Through the unreasonable delay of the principal in bringing suit, ratification resulted by operation of law, *Whitley v. James*, 121 Ga. 521, 49 S. E. 600.

Estoppel of agent. After agents have sent telegrams and letters reporting the sale of land for a client and have been paid their commission they are estopped to deny a con-

tract of agency, *Northup v. Bathrick*, (Neb. 1907) 113 N. W. 808.

Sec. 35. Duties and Liabilities.

Effect of misrepresentation to principal on broker's right to a commission, see *post* §37.

Duty of disclosure. An agent knowing certain tax deeds were void fraudulently concealed that fact from his principal and obtained a quit claim deed to a third party, who held the land for his benefit. The deed was void in equity at the instance of the principal, *Cantwell v. Nunn*, (Wash. 1907), 88 Pac. 1023. A real estate agent notified an agent of the company owning land that he could let the company have \$900 net and that he was getting more, but although the company's agent reported the sale as \$950.00 and \$50.00 commission, the real estate broker was not compelled to return the excess purchase money to the company after the sale was consummated, *Deming Inv. Co. v. Meyer*, (Okl. 1907) 91 Pac. 846. A. obtained authority from B. to sell timber at a certain price, and secured purchasers at that figure, but, representing to B. his inability to obtain the price set, he induced B. to convey at a lower figure. In collusion with the purchasers, A. appropriated to himself the entire amount above the sum paid the owner. The fraud was discovered by B. who sued for a rescission of the contract. The purchasers offered to abide by their contract and to pay the same as the court might decree. The full amount was directed paid to B. the owner, deducting a commission to A., *Lee v. Patillo*, 105 Va. 10, 52 S. E. 696. No specific performance will be granted where a real estate broker in reality acting for the real buyer, concealed from the seller that buyer's name and falsely induced the seller to believe that the nominal buyer was financially responsible, *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322.

Payment to broker's agent. When a defendant bought land from the owner's duly authorized agent he was entitled to a deed on payment of the balance of the purchase money but his payment thereof to the agent of the real estate broker did not bind the broker's principal because the agent was the purchaser's agent to pay the money to the broker, *Chouteau Land & Lumber Co. v. Chrisman*, 204 Mo. 371, 102 S. W. 973.

Liabilities. A. wishing to purchase a tract of land, went to B. a real estate broker and when B. told him he had the

land for sale at \$1700, A. left a deposit for which B. gave a receipt reciting that it was the first payment on the lot, "balance to be paid as soon as deed can be procured." The real estate broker was not bound under this agreement to deliver the land or pay damages if the owner increased the price so it became impossible to buy the property, *Kroeger v. Good*, (Idaho 1907) 89 Pac. 633.

Duty not to compete with principal. An agent who is employed to sell land violates his duty by buying it from his principal for the purposes of immediately disposing of it to a purchaser at an advance and is liable for his profit, *Kingsley v. Wheeler*, 95 Minn. 360, 104 N. W. 543. When White, a real estate agent, entered into a contract, binding himself and a purchaser to pay \$7,000.00 for a piece of land, and a receipt according to this agreement was given to the purchaser for his deposit, the real estate agent was not compelled to account to the purchaser for the amount saved when he bought the property for \$5,000.00 under an option, *Scott v. White*, (Ore. 1907) 91 Pac. 487. Although a company tried to get the sale of a property as agents of the owners and subsequently accepted a commission for such a sale, the sale was not voidable because they were interested in the purchase, when the owner did not recognize them as his agents, but dealt with them at arms length, receiving offers to purchase submitted by them for net prices "and no commission mentioned," *Steele v. Lawyer*, (Wash. 1907) 91 Pac. 958.

Sec. 36. Termination of Relation—Effect on right to commission—Time limited.

Death. Although a ten year contract was entered into between the owner and the plaintiff whereby the owner received 25 per cent. of all sales made in an addition to a township and at the expiration of the contract the plaintiff was to receive 25 per cent. of the balance at a fair valuation, the contract created the relation of principal and agent and it was canceled on the death of the principal, *Kimmell v. Powers*, (Okl. 1907) 91 Pac. 687. A power of attorney giving full authority to sell real estate and providing that the death of the grantor shall not revoke it is not a power coupled with an interest and is revoked by the death of the grantor, *Weaver v. Richards*, 144 Mich. 395, 108 N. W. 382

Discharge before deal closed. Evidence examined and

held to show that the plaintiff was not entitled to any commission for renting the defendant's premises because the latter had previously revoked his authority to lease, *Cadigan v. Crabtree*, 192 Mass. 233, 78 N. E. 412. Upon the evidence it was found that the plaintiff, a real estate broker, was discharged by the defendant before the latter in good faith negotiated a sale of his property directly with a buyer, and was therefore entitled to no commissions, *Smith v. Kimball*, 193 Mass. 582, 79 N. E. 800. For a case between an alleged agent and a land owner holding that agency existed at the time of an alleged sale, see *Brinson v. Exley*, (Ga. 1905) 49 S. E. 810. An owner gave a real estate agent a written authority to sell land for a valuable consideration at a certain definite price for one week. The broker produced a purchaser and was paid his commission but the authority to sell was revoked before a sale had been made and an agreement to sell was not binding on the owner, especially when the purchaser's agent had notice of the revocation, *Norton v. Sjolseth*, 43 Wash. 327, 86 Pac. 573. An agent whose authority is revoked while negotiations for a sale are pending is entitled, not to a commission on the amount for which the property was sold by the owner, but to the fixed sum agreed upon at the time his services were enlisted, *McGovern v. Bennett*, 146 Mich. 558, 109 N. W. 1055. When a real estate agent found a purchaser for property and a deed was executed but not delivered because of a disagreement as to who should pay the taxes on the property which had been assessed, and the broker acquiesces in the failure of the negotiations, he is not entitled to his commission if the sale is made to his customer through another broker, unless collusion or bad faith is shown, *Girardeau & Saunders v. Gibson*, 122 Ga. 313, 50 S. E. 91.

Sale consummated by principals. When a real estate broker fails to sell the property, and tells a prospective purchaser to trade with the owner who sells the property, relying on the broker's abandonment, the broker can recover no commission, *Enochs v. Paxton*, 87 Miss. 660, 40 S. 14. The fact that a broker, through former negotiations resulting in an option, which was forfeited, may have contributed to a subsequent sale of the property, by the administrator of the owner, will not sustain a claim for a commission, *Crome v. Trickey*, 204 U. S. 228. A broker who is employed to make a sale of an owner's "interest in certain land is entitled to a

commission on the sale to a co-tenant with whom the broker has had negotiations, though a portion of the land is reserved by the seller and the final negotiations are had by the owner directly with the purchaser, *Burdon v. Briquelet*, 125 Wis. 341, 104 N. W. 83. When the defendant listed her land for sale with the plaintiff, a real estate agent, and the latter offered it to one Crawford who stated that he would decide in a few days and then purchased direct of the defendant, the plaintiff was clearly the procuring cause of the sale under his employment for that purpose and entitled to his commission, *Hunton v. Marshall*, 76 Ark. 375, 88 S. W. 963. Where a real estate broker saw an owner of a farm and learned the terms upon which it could be bought, advertised it and offered the owner a price less than the above terms it was held that upon a sale negotiated direct by the owner and the broker's intended customer, for the original price set by the owner, the broker was not entitled to a commission, *Nance v. Smyth*, (Tenn. 1907) 99 S. W. 698. An owner gave his property to a real estate broker to sell at \$9,000 net and the broker told him he had an offer of \$9,500 and that he would charge \$500 commission to which the owner agreed. Then the owner closed up the sale with the purchaser himself, but the broker was entitled to his commission, *Norris v. Byrne*, 39 Wash. 59, 80 Pac. 808. When brokers gave an option on the purchase of property and they consented to the withdrawal of the property from their hands, they cannot claim a commission if a sale is subsequently made whether they consented to its withdrawal during the time of the option or after it had expired, *McGonigal v. Raughley*, (Del. 1906) 63 Atl. 801. A purchaser was found by a real estate broker for a piece of real estate, but when she purchased the property three months after notifying him that she would not buy it, such notification did not deprive him of the right to his commission, *Groscup v. Downey*, (Md. 1907) 65 Atl. 930.

Time limited. An agency for the sale of real estate, if unlimited in time, must be performed within a reasonable time, *Oliver v. Katz*, 131 Wis. 409, 111 N. W. 509. Where a real estate broker had the right to sell land until a certain date, his right to a commission expired on that date unless the owner accepted his services, recognized the agent and acted as though the contract were still binding, *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899. A real estate broker was empowered to

sell land at a certain price, "provided the matter was closed up in 30 days," by means of a letter containing such authority; the time so limited began to run upon the date of the mailing such letter, and not upon the date of its receipt by the broker, *Satterthwaite v. Goodyear*, 137 N. C. 302, 49 S. E. 205. A written contract authorized a broker to sell a tract of land at a certain price promising a commission if the sale were made before a certain time. Within the limited time a purchaser was found who offered to take the land on the terms as agreed and the broker had a right to his commission and a formal tender of the price was not necessary, *Carlin v. Lifur*, 2 Cal. App. 590, 84 Pac. 292. A broker employed to sell standing timber cannot recover a commission unless he got a buyer during the life of the contract if limited to a certain date, and if not limited, then within a reasonable time after its execution. This is true if thereafter the owner personally made a sale to a person to whom the broker had introduced him as a prospective purchaser, *Hurst v. Williams*, (Ky. 1907) 102 S. W. 1176. Where an owner agreed to sell his property for a certain sum before 3:30 P. M. of that day and the purchaser was produced before that time with whom certain details of the payments were discussed and a slightly changed contract which was completed at 5:30 was drawn up with the approval of the owner, who did not refuse to allow the brokers a reasonable time to have it signed, the brokers were entitled to their commission when they procured the signature on the next morning at 11 o'clock, *Muir v. Moeller*, (Wash. 1907) 90 Pac. 1042.

Sec. 37. Commission—Whether broker entitled to. *In general.* A real estate broker acting under written authority to sell who made an oral contract to sell to persons ready, willing, and able to buy, was entitled to his commission, *Pope v. Caddell*, (Ky. 1907) 102 S. W. 327. "To entitle a recovery on a contract of brokerage for the purchaser of real estate, it is essential that the broker establish that he procured a valid conveyance of the real estate, or an enforceable contract of sale of the same, before he is entitled to the commission stipulated in his contract with the purchaser," *Bolton v. Coburn*, (Neb. 1907) 111 N. W. 780. A broker was to be entitled to a commission "as soon as the deal is made, for making such transfer or deal, sighting me to a buyer or being instrumental

in any manner whatever." Held, the broker became entitled to the commission "when a purchaser was produced and presented to the appellant, who was ready and able to buy." Actual tender of cash is not necessary, *McDermott v. Mahoney*, (Ia. 1906), 106 N. W. 925. Where there is no exclusive agency it must appear that the owner knew or from the circumstances ought to have known that the broker was instrumental in inducing the purchaser to enter into the contract, *Quist v. Goodfellow*, 99 Minn. 509, 110 N. W. 65. Where a real estate broker in whose hands land is placed to sell upon commission purchased from the owner's agent, who had power of attorney to sell, the latter has no right to retain commissions out of the price received by him, in the absence of a special agreement to that effect, *Knotts v. Midkiff*, 114 La. 234, 38 S. 153. A broker who, with permission of another broker, who has the sale of land, and the owner, makes the sale is not entitled to his commission as assignee of the other broker, but because he himself made the sale with the knowledge and consent of the owner, *Munson v. Mabon* (Leuth, Intervenor), (Ia. 1907) 112 N. W. 775.

First introduction. A broker showed a piece of real estate to a party who afterwards consulted a friend who bought the property for her through another broker, but the first broker to show the property was nevertheless entitled to his commission, *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264. The defendant asked the plaintiff to look up good mining lands, and the plaintiff then brought to him the written report of a certain property and gave him the name of the owner and the price, telling him he should expect a commission, to which the defendant agreed orally. After the subsequent purchase of the property by the defendant the plaintiff was entitled to recover his commission, although he did not take part in the subsequent negotiations, *Friedman v. Suttle*, (Ariz. 1906) 85 Pac. 726. After a customer had opened negotiations with the owner and then accidentally met a real estate broker and went to see the property with him, the broker was only entitled to recover the actual value of his services and not the regular five per cent. commission, *Penland v. Ingle*, 138 N. C. 456, 50 S. E. 850. A real estate broker obtained an oral offer from a purchaser which he submitted to the owner within the five days of his written authority and the owner accepted it, but sold the property through another broker to the purchaser.

The broker presenting the first oral offer was entitled to recover his commission, *Levy v. Wolf*, 2 Cal. App. 491, 84 Pac. 313.

Buyer's financial ability. To recover a commission a broker must prove that the prospective purchaser was financially able to purchase upon the proposed terms, *Sherburn Land Co. v. Sexton*, 130 Ia. 85, 106 N. W. 378. An owner of real estate was entitled to repudiate an oral agreement to accept the terms of a contract to sell his property without rendering himself liable to the broker for his commission, provided there was no evidence to prove that the purchaser produced by the broker was financially able to purchase the property, *Fox v. Denargo Land Co.*, 37 Colo. 203, 86 Pac. 344.

Contract by unlicensed broker. Although Sec. 659, code Pub. Loc. Laws makes it a misdemeanor and imposes a fine for carrying on the business of a real estate agent without a license, a contract made by an unlicensed real estate agent is not invalid as the statute does not declare it invalid. Therefore his right to obtain a commission on a sale made by him is not affected by the statute and he may enforce it in a court of law, *Coates v. Locust P. C. of C. of Baltimore*, 102 Md. 291, 62 Atl. 625.

Sale through broker's unauthorized act. Where the defendant placed land in the hands of the plaintiff, a real estate broker, for sale, with directions not to advertise, but the plaintiff forgetting his instructions, advertised, and solely as a result of the advertisement a purchaser went direct to the defendant and bought the property, the plaintiff was entitled to a commission. The defendant could have refused to deal with the customer but if he did deal with him he must treat him as one procured by the plaintiff, *Maloon v. Barrett*, 192 Mass. 552, 78 N. E. 560.

Refusal of principal to consummate deal. A contract to find a purchaser for defendant's land is not void or voidable because the wife fails to release her homestead, *Kepner v. Ford*, (N. D. 1907) 111 N. W. 619. A broker, whose commission depends upon the fulfilment of the terms of a contract for the sale of land cannot complain because the vendor takes advantage of the breach of the contract by the vendee and thus deprives him of his commission, *Van Norman v. Fitchette*, 100 Minn. 145, 110 N. W. 851. A. agreed to give B. one-third of the net profit from the sale of certain lots if

B. procured their purchase. A. died and his heirs refused to sell although the lots had increased many times in value, but B. was allowed one-third of the net profit in cash obtained by the increase in valuation of the land, deducting from its present valuation the purchase price, interest and taxes, *Kauffman v. Baillie*, (Wash. 1907) 89 Pac. 548. When a real estate agent acting under a power of attorney starts to see the owner who is in another city accompanied by a prospective buyer who has agreed to purchase, and upon reaching the owner the latter withdraws the land from the market, the agent is entitled to a commission, *Lockett Land & L. Co. v. Brown*, 118 La. 943, 43 S. 628.

Performance varied from agreement. Certain parties owning a ranch in which they held shares of capital stock completed a sale of the ranch with a customer introduced by a real estate broker by the sale of the shares of the capital stock of the ranch company instead of by deed, but the broker was entitled to his commissions, *Vandercook v. Wilmans Co.*, (Cal. 1906) 87 Pac. 1116. A real estate broker was entitled to recover a commission for the sale of a homestead, although the delivery of the property was made by the entryman's releasing his rights at the land office and allowing the purchaser to file an entry for the land, instead of delivering the homestead after the entryman had obtained his patent, *Hoyle v. Johnson*, 18 Okl. 330, 89 Pac. 1119.

Misrepresentation or concealment by broker. A real estate broker acting for both parties who misrepresented to one that the other owned a certain farm and held it for a certain price, when he knew the real owner was offering to sell it for much less, was entitled to no commission for an exchange afterwards made between the parties, *Featherston v. Trone*, (Ark. 1907) 102 S. W. 196. Where agents had a contract authorizing them to sell property at a certain net price, with the understanding that they should receive anything above that price as their commission, they did not deal fairly with their principal when they sold the property for \$500 more than they paid their principal, some three days before the owner signed the deeds, selling the property without letting the owner know that they had sold it for a large advance, *Tate v. Aitken*, (Cal. 1907) 90 Pac. 836. A. made an agreement with B. by which B. should receive all in excess of \$275 per acre for land on which A. had an option provided B. could sell it before A's

option expired, and that B. should also get \$500 in additional for his services. B. made a sale to C. for A. and concealed the amount he received above \$275 per acre, representing that he did not get anything out of it, but he was not the confidential agent of A. and therefore was not compelled to tell him how much he received, and such refusal did not debar B. from recovering the \$500 as promised in the agreement for his services, *Fulton v. Walters*, 216 Pa. 56, 64 Atl. 860. If a real estate broker made an arrangement with a purchaser whereby he should divide the profit to be obtained on a sale of land after he had purchased it for him, and the broker took half of the commission on the purchase of the property belonging to another broker to whom he promised a share of the profits on the sale of the property, and concealed this transaction from the owner, the agreement to give the broker half of the profits was voidable if the owner desired it, *Hanna v. Haynes*, 42 Wash. 284, 84 Pac. 861.

Broker putting cloud on title. Where the complainant's agent without her authority executed an agreement in her name giving the defendant the exclusive right to buy or sell her farm during one year for \$20,000 and in case the defendant sold he was to receive 2 per cent. of the \$20,000 and all the amount above that sum for his services, and the defendant offered it to a prospective buyer at \$30,000, but the latter later made a contract direct with the complainant to buy at \$22,500, and thereupon the defendant filed his contract for record and refused to release his rights thereunder for less than \$10,000; the defendant's act made a cloud upon the title which justified the purchaser in refusing to complete the sale and deprived the defendant of any right to a commission, *Woolf v. Sullivan*, 224 Ill. 509, 79 N. E. 646.

Sec. 38. Commission—Amount of.

Reasonable sum in absence of agreement. When a real estate agent succeeded in bringing together the owner of a plantation and a person who later bought it for \$61,000 there having been no express agreement as to the amount of compensation, the court allowed the agent \$1220 as a commission, *Stewart v. Soubiral & Co.*, 119 La. 211, 43 S. 1009. Defendant was authorized to sell lands and asked plaintiff to assist in the sale of "outlots" K. & L. at a specified commission. After plaintiff had procured a purchaser, defendant found that his

principal would sell only the entire tract. Plaintiff then got a purchaser for all. Held, Plaintiff entitled to the agreed commission plus a reasonable sum for services in selling the balance, *Triplett v. Jackson*, 130 Ia. 408, 106 N. W. 954.

Conditional commission. An owner who agrees to pay a broker as commission whatever he obtains above a certain figure is not liable for any commission where there was no such excess above that figure, *Holcomb v. Stafford*, (Minn. 1907) 113 N. W. 449. A reply to an inquiry from a broker as to whether the owner of land would sell stating that he "would sell for \$10 per acre, part down and time for balance," does not bind the owner to pay the broker a commission on the excess above \$10 which a purchaser might be willing to pay, *Harris Bros. v. Reynolds*, N. D. 1907, 114 N. W. 369. A broker employed to sell a note and mortgage given by a cemetery association who obtained a purchaser upon condition that the latter's conveyancer was satisfied with the mortgage, where the conveyancer was not satisfied, and the sale therefore fell through, was not entitled to a commission, *Wiggin v. Holbrook*, 190 Mass. 157, 76 N. E. 463. A broker made an agreement that he should receive his commission when the owner received his money for the sale, but when less than one-tenth had been paid and the purchaser was unable to comply with the terms of the contract by furnishing an improvement bond through no fault of the owner, the broker was not entitled to recover his commission, *Riggs v. Turnbull*, (Md. 1907) 66 Atl. 13. A real estate broker who leased a house at Bar Harbor for 5 "seasons," the lease containing a provision that it should terminate at the end of any season if the premises were sold, cannot recover commissions, for the three years after the lease was terminated by such sale, *Mears v. Jones*, 102 Me. 485, 67 Atl. 555. Where a real estate broker was to have as his commission everything in excess of a certain sum for which the land was "sold" he does not earn a commission by procuring the execution of a binding contract for sale which was never in fact performed by the parties, *Munroe v. Taylor*, 191 Mass. 483, 78 N. E. 106. A letter from a principal to a real estate agent authorizes him to find a customer for land and agrees that he shall have his commissions from the payments as made. If he receives 5 per cent. commission on the first payment and then the vendee defaults all other payments, the broker then has no right to claim the rest

of the commission, *Murray v. Rickard*, 103 Va. 132, 48 S. E. 871. When a contract for the sale of land provided a total purchase price of \$9,600 out of which the sellers were to get \$8000 and a real estate agent the balance it was held that as the purchasers refused to carry out the contract by paying the purchase price the real estate broker could not recover any sum from the sellers. "So long as the purchase price was unpaid, and so long as 'the sellers' were not to blame for its nonpayment, they are not liable," *Lewis v. Briggs*, 81 Ark. 96, 98 S. W. 683. A real estate agent employed under a contract to sell at \$9 per acre and receive \$1 per acre commission, cannot recover on a quantum meruit where the sale is made with his consent to a purchaser found by him at less than \$9 per acre. Mere acceptance by the customer of the assistance of the broker did not amount to a waiver of the special contract, *Ball v. Dolan*, (So. Dakota 1908) 114 N. W. 998. When an owner stipulated with a real estate broker that one-half of the commission for a sale should become due when one-third of the purchase price was paid, and the balance when one-half was paid, such owner having accepted the purchaser's notes for more than two-thirds of the purchase price could not by surrendering them if good to the maker avoid payment of the broker's commission but if being uncollectible the holder accepted a small sum in good faith in settlement of his rights thereunder the broker could not recover, *Boyson v. Frink*, 80 Ark. 254, 96 S. W. 1056.

Under special contract. An agreement with a broker to "divide all moneys obtained over \$20 per acre, less \$455," on a sale of land means that amount including a mortgage on the property which was not agreed to be assumed by the grantee, *Hobart v. Stewart*, 99 Minn. 394, 109 N. W. 704. When the defendant, a real estate broker, offered the plaintiff, another broker, a commission of \$1 per acre if he procured a purchaser of a farm at \$37.50 per acre with the crops, upon a voluntary sale made by the defendant to a purchaser sent by the plaintiff at \$35 per acre without the crops, the plaintiff was entitled to a commission of \$1 per acre, *Provident Trust Co. v. Darrough*, 168 Ind. 29, 78 N. E. 1030. A contract was entered into with a real estate agent by a company owning land that they would allow him 10 per cent. commission on all sales he made for them to go toward the purchase of a tract of land of which the plaintiff took possession and which was

shown by number on a map. When the defendants refused to allow the commissions on the purchase price he was entitled to a decree of specific performance of the contract if the description was sufficient to enable a surveyor to locate the property, *Guillaume v. K. S. D. Fruit Land Co.*, 48 Ore. 406, 86 Pac. 883. The plaintiff, a real estate agent, finding certain property was liable to be lost to the owner on account of a purchase of a tax deed from the state by hostile interests, advanced his own money and took a tax deed to the property, informing the owners of what he had done, and stating that he thought he should have one-half of the price that might be obtained on a sale of the property. In reply the owners approved the redemption and tacitly accepted the plaintiff's proposition for a division of the proceeds. The real estate agent was entitled to recover the commission when he subsequently made the sale with the owner and no fraud was shown, *Casady v. Casady*, 31 Utah 394, 88 Pac. 32.

Sec. 39. Commission—Action and evidence—Quantum meruit. A real estate broker, selling an estate after an agreement for a fixed commission with the administrator and heir, cannot receive his commission from the funds of the estate, but he has a right of suit against the administrator in his personal capacity, *Simmons*, ex parte, 69 S. C. 385, 48 S. E. 279. Where optionees agreed to pay a broker \$7,500 as a commission for the sale of certain land, a contract of sale may be introduced in evidence as proof of the subsequent sale, and the broker is entitled to his commission, *Cutten v. Pearsall*, 146 Cal. 690, 81 Pac. 25. In an action by a real estate broker to recover compensation for services in procuring a purchaser the question of whether or not he was ever employed as a broker is for the jury, *Stephens v. Bailey & Howard*, (Ala. 1906) 42 S. 740. When the plaintiff testified that the defendant promised him a commission of 1 per cent. on the contract price for the erection of certain buildings, and that both parties understood that it was to include the cost of the land as well as the buildings, the defendant has no ground for an appeal from a verdict granting a commission to the plaintiff on that basis, on the ground that it was not in accordance with the evidence although it was an oral contract, *Richards v. Richman*, (Del. 1906) 64 Atl. 238.

Quantum meruit. A broker under contract to sell at a

certain price was not allowed to recover in quantum meruit where the sale was made at a less price in *Ball v. Dolan*, (So. Dakota 1908) 114 N. W. 998. The broker may not recover in quantum meruit where his contract of agency was void as not in writing, *Barney v. Lasbury*, (Neb. 1906) 107 N. W. 989.

CEMETERIES

Exemption from taxation, see *post* §531.

Sec. 40. Character and rights of cemetery organizations—Statutes. Right of cities to take for cemeteries by eminent domain, N. C. Laws 1907, Ch. 172. A cemetery corporation which by its charter was required to buy land within a specified distance from large centres of population and to sell to all who may apply, the same measure of accommodation for the same measure of money, was held to be a public service corporation, *Memphis R. Co. v. Forest Hill Cemetery Co.*, (Tenn. 1906) 94 S. W. 69. When a cemetery organization is formed for the care of the lots and graves, and is prohibited by law from making any pecuniary profit from its business, it can be enjoined by a lot owner from making a gift to a church of \$200 when the burial ground is not in good condition and the bills of the company are not paid. As the company can make no profit, it cannot make any gift to anyone else without consideration, *Clark v. Rahway Cemetery Co.*, 69 N. J. Eq. 636, 61 Atl. 261.

Exemption of cemetery. The Act of April 8, 1875, §8 (Revision, p. 102; Gen. St. p. 350, § 8), relating to the exemption of cemeteries from sale by execution, was construed to prevent the foreclosure of a mortgage on a cemetery, *Spear v. Locust W. C. Co.*, (N. J. Ch. 1907) 66 Atl. 1068. *Burns' Ann Ind. St.* 1901, sections 4708 et seq, protects from taking for a railroad not only that part of a cemetery where there are graves but the part intended for burials in the future, and includes all reasonable additions to an existing cemetery, even though a part thereof is not occupied by graves, but is held for cemetery purposes, *McCann v. Trustees of Cemetery*, 166 Ind. 573, 77 N. E. 1090. Various Tennessee statutes as to eminent domain and cemeteries construed and held not to

authorize a railroad by right of eminent domain to run its tracks through the part of a cemetery not used as yet for burial purposes. It being possible to avoid the cemetery the railroad must make the detour, *Memphis Ry. Co. v. Forest Hill Cemetery Co.*, (Tenn. 1906) 94 S. W. 69.

Statutes. Election of trustees of public graveyards in towns, Ill. Laws 1907, p. 57, Amending Sec. 1, Act of May 29, 1879. Management of city cemeteries by board of regents is authorized by Ind. Laws 1907, Ch. 89. Sales of cemetery real estate are regulated by Neb. Laws 1907, Ch. 27. The creation and administration of cemetery trusts are provided for by N. Y. Laws 1906, Ch. 362. Cemetery companies owning land not used for cemetery purposes are authorized to sell it by Tenn. Acts 1907, Ch. 94. Corporations for the owning and maintaining of cemeteries are authorized by Texas Laws 1907, Ch. XXIII.

Sec. 41. Rights in cemetery lots. Under Code Sec. 587 and 697, a city ordinance providing for the sale of cemetery lots with limited rights of burial gives no such interest as will support an action of ejectment, *Anderson v. Acheson*, 132 Ia. 744, 11 N. W. 335. When an executor bought a cemetery lot from the trustees of a cemetery, taking no deed but merely a certificate showing that the purchase was for the benefit of the estate, the legal title remains in the cemetery corporation. The widow was entitled to be buried therein by the side of her husband, and all of her children were entitled to sepulture in it, but the stepchildren of the deceased have no more claim to an interest therein by inheritance from their mother than if, strangers to her, she had undertaken in her life time to convey to them an interest in the property, *Robertson v. Mt. Olivet Cemetery Co.*, 116 Tenn. 221, 93 S. W. 574.

"Where one is permitted to bury his dead in a public cemetery, even though this be by license or privilege, he acquires such a possession of the spot of ground in which the bodies are buried as will entitle him to maintain an action against the owners of the fee or strangers, who without right so to do disturb it, *Anderson v. Acheson*, 132 Ia. 744, 110 N. W. 335.

CHARITABLE USES

Exemption from taxation, see *post* §531.

Sec. 42. Construction and validity of conveyances for—Religious and voluntary associations. A Maine school district cannot be a trustee under a testamentary trust to build an Universalist Church but in order that the trust shall not fail the probate court will appoint one, *Childs v. Waite*, 102 Me. 451, 67 Atl. 311. A devise of land to three trustees to apply the proceeds "to the education of young men preparing for the ministry of the Cumberland Presbyterian Church, or in any other Protestant Church, said young men to be selected by said trustees, or any two of them" was a permanent charity and as the selection of the beneficiaries would pertain to the office of trustee it was not limited to the lifetime of the trustees actually named in the will, *Woodruff v. Hundley*, 147 Ala. 287, 39 S. 907.

The testator bequeathed all the remainder of his real and personal estate to the town of Troy in trust to be divided each year between the school districts and the fractional school districts of the town, and subsequently all the districts were combined into one, but then the legislature by a special act created a separate district of a small part of the town and the new district was therefore entitled under the terms of the bequest to one-half of the income from the trust fund although the number of scholars was about two-elevenths of the total number in the town, *North Troy G. S. D. v. Town of Troy*, (Vt. 1907) 66 Atl. 1033.

Validity—Definiteness. Cal. Civ. Code, Sec. 1313, was construed to render a devise to a charitable institution void when executed more than 30 days before the death of the testator, *Russells Estate*, in re, 150 Cal. 604, 89 Pac. 345. The word "benevolent" in connection with "charitable and religious" does not render a trust void for indefiniteness, *Dulles' Estate*, in re, (Penn. 1907) 67 Atl. 49. Where a testatrix has expressed her desire to devote the greater portion of her property to charity and has given it to trustees with power to select the beneficiaries the gift is sufficiently definite to be valid, *Selleck v. Thompson*, (R. I. 1907) 67 Atl. 425. Where a will devised land and personalty to a wife and provided that all the income above a certain sum should be devoted to such char-

ities as she should choose, she was vested as trustee with such an estate as was necessary to execute the trust. The trust was not void for uncertainty in amount or as to the beneficiaries, *Welch v. Caldwell*, 226 Ill. 488, 80 N. E. 1014. It was held that a devise of property to the "Methodist E. Church, South and *Missionary* cause," was void because indefinite. "What particular South Methodist Church is not named, nor is the particular field of Missions named," *Board of Trustees v. May*, 201 Mo. 360, 99 S. W. 1093. A devise to a convent "for the purpose of helping to educate poor Catholic children," and another to a pastor of a church for the purpose of helping to establish a school—for the education of Catholic boys, and for helping to educate young men for the priesthood," were not void for indefiniteness. It created a public charity and the class to be the object of the bounty is plainly designated, the selection of the individuals being left to the discretion of the trustee, *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952. When a testator left all his property to his wife for life with a proviso that she might in her discretion "give to such of my relations such aid or assistance as" she "thinks proper" and "that the balance of my said property will be given to advance the cause of religion, and promote the cause of charity, in such manner as my wife may think will be most conducive to the carrying out of my wishes," the provisions were too indefinite to constitute a gift to charity, which equity could enforce after the widow's death, *Hadley v. Forsee*, (Mo. 1907) 101 S. W. 59.

Title of charitable organization. Under a devise to executors in trust to sell the land and pay over three-fourths "to the trustees of St. Francis hospital in the city of New York, for the benefit and use of the Blessed Virgin Mary purgatorial fund of said hospital," the hospital took an absolute gift not cut down by any trust, *Johnston v. Hughes*, 187 N. Y. 446, 80 N. E. 373.

Title of religious associations. For a full discussion of a trust deed to a religious organization for public worship and religious instruction which was declared valid against the heirs of the grantor, see *McKenzie v. Trustees of Presbytery of Jersey City*, 67 N. J. Eq. 652, 61 Atl. 1027. Although a deed to a church of 5 acres of land was void without the sanction of the legislature under the Declaration of Rights, Art. 38, 20 years' possession by the religious society made a valid title,

although the land had not been used for a parsonage, church, burial ground or other religious purposes, *Regents of U. of M. v. Trustees of Calvary M. E. Church*, (Md. 1906) 65 Atl. 398. Where in a deed of trust the provisions were so indefinite that they merely provided "To be held by them in trust for Trinity Parish in the town of Moundsville, in the county of Marshall, and state of West Virginia;" and there is nothing on the face of the deed to indicate the purpose of the trust, it was void for ambiguity, and the property reverted to the estate of the grantor, *Weaver v. Spurr*, 56 W. Va. 95, 48 S. E. 852. A deed granted land to a church for the use of the pastor, providing that the property should revert to the grantor or his heirs if used for any other purpose. A parsonage was built on it and occupied by the minister, but the church joined a circuit, the minister of which resided at a distance and the parsonage was left vacant. The church did not lose the title to the property by non-occupation by the pastor but could rent the property and apply the rents for the use of the pastor, and although it had been occupied without rent by a retiring pastor such temporary occupation did not invalidate the title when it did not appear that it was possible to rent it at once, *White v. Britton*, 75 S. C. 428, 56 S. E. 232.

Where the testatrix grants land to a vestry of a church absolutely a provision that the rector shall determine the use to which the property shall be put is void as it is a naked collateral power repugnant to the fee devised to the vestry, *Doan v. Vestry of Parish of Ascension*, 103 Md. 662, 64 Atl. 314. If a deed was made to the vestry and wardens of a parish for a consideration of \$1 and was duly proved and recorded, it passed a title free from any trust or limitation, when no limitation was contained in the deed, and they had power to sell. See Code S. 1245, *St. James Parish v. Bagley*, 138 N. C. 384, 50 S. E. 841. If a deed of land was made to the vestry and wardens of a parish for a consideration of \$1 and was duly proved and recorded (See Code s. 1245) it passed a title free from any trust or limitation, when such a limitation was not contained in the deed, and when any implied limitation was denied by a letter of the donor acknowledging that the trustees had complete power to dispose of the land, *St. James Parish v. Bagley*, 138 N. C. 384, 50 S. E. 841. The plaintiff conveyed "to the officers and members of Wilson Creek Baptist Church," for the purpose of keeping and maintaining a church for wor-

ship and all the privileges and appurtenances thereto belonging, to the said officers and members of the said church, their successors and assigns, and their only use and behoof" a tract of land, the grantees of which were about to deliver a lease of a portion to one for the erection of store property when suit was brought alleging a breach of trust and acting contrary to the terms of the deed which required that the property should be used only for purposes of religious worship. The deed created a trust for the sole use and benefit of the congregation named in the deed, *Hayes v. Franklin*, 141 N. C. 599, 54 S. E. 432.

When the members of a religious congregation divide, and one faction breaks away from the congregation and forms a new organization the title to the property of the congregation will remain in that part of the congregation which adheres to the tenets and doctrines originally taught by the congregation to whose use the property was originally dedicated. *Christian Church of Sand Creek v. Church of Christ of Sand Creek*, 219 Ill. 503, 76 N. E. 703.

Voluntary association. Where a voluntary religious society which was made beneficiary of a will was in existence and exercising the functions for which it was organized when the testatrix died and the will became operative has since been dissolved, the property given it by the will for its use has reverted to the heirs at law of the testatrix, *Miller v. Riddle*, 227 Ill. 53, 81 N. E. 48. Although a deed passed certain property to a church community which was not incorporated, without naming anyone individually as grantee or any definition of who constituted the church community, the conveyance was void when the church had not taken possession of the property for 40 years, *Rexford v. Zeigler*, 150 Cal. 435, 88 Pac. 1092. Under the Mass. St. since 1811 a voluntary religious society for the purpose of taking, holding and transmitting property has possessed all the qualifying attributes of a duly organized corporation. In an action to quiet title brought by such society's successor it may be shown that the defendant's ancestor in whom the record title stood held as trustee for the society by evidence of votes entered in the society record book by him as clerk which were of themselves inconsistent with his claim of ownership. The fact that he regularly attended divine service in the church did not make him in possession of the land with the society. Although the

conveyance by the trustees of the vountary society to the plaintiff, a corporation, did not appear to pass the title of the society because it only purported to convey the interest of the individual grantors, the plaintiff upon obtaining a proper confirmatory deed may have a decree quieting the title, *First Baptist Church v. Harper*, 191 Mass. 196, 77 N. E. 778.

COMMUNITY PROPERTY

See Husband and Wife.

CONDITIONS

See Vendors and Vendees.

Conditional estates, see Estates, §149.

In wills, see post §651.

Condition in restraint of alienation or marriage, see *post* §652.

CONTRACTS FOR SALE OF LAND

See Vendors and Vendees.

CORPORATIONS

Taxation of, see *post* §538.

See further, Municipal Corporations.

Sec. 43. Ownership of land by corporations—Statutes.

Right of corporations to condemn land, see *post*, Eminent Domain.

Art. 23, Sec. 227, Pub. Gen. Laws regulating holding of land by mining companies is amended by Md. Laws 1906, Ch. 178. The ownership of land by corporations is regulated by Miss. Laws 1906, Ch. 252. Sec. 3238 Rev. Laws 1905 limiting the ownership of land by corporations is amended by Minn. Laws 1907, Ch. 439. Ch. 687, Laws 1892, limiting amount of real estate which may be held by a corporation, is amended by N. Y. Laws 1906, Ch. 228. The holding of real estate by domestic insurance corporations is regulated by Pa. Laws 1907, No. 224. Art. 651, Ch. 3, Tit. 21, Rev. Stat., as to power

of corporations to hold real estate, amended by Tex. Laws 1907, Ch. CLVIII. Foreign corporations may not mortgage their real estate to the injury of any resident creditor, Ind. Laws 1907, Ch. 176, Sec. 6. Foreign corporations are authorized to acquire land by eminent domain in accordance with provisions of Tit. 7, Pt. 3, of the Code, Mont. Laws 1907, Ch. 23.

Religious corporations are given the power to receive, hold and convey property by Minn. Laws 1907, Ch. 60. The Act of Apl. 17, 1905, authorizing the sale of land by religious and educational associations is amended by N. J. Laws 1907, Ch. 208. The holding of real estate by religious societies is regulated by Pa. Laws 1907, No. 108. Two-thirds vote required for transfer of real estate by church society to church corporation under Conn. Acts 1907, Ch. 42, instead of four-fifths as required by Sec. 3963 Gen. Stat.

Sec. 44. Conveyances and contracts by corporations. The secretary of a corporation may not, unauthorized, make a contract binding upon the corporation for the sale of land, and if he, by virtue of his office should do so, such a contract would not be enforceable against the corporation, *Cobb v. Glenn Boom & Lumber Co.*, 57 W. Va. 49, 49 S. E. 1005. As the result of the votes of the stockholders of two corporations, whereby the property of one was to be conveyed to the other, the verbal statement of the representative of the grantee corporation, at a joint meeting of the stockholders, that certain lots owned by the grantor were not desired by the grantee, would not effect the rights under the contract of the grantee in such lots, *Pinchback v. Bessemer, Min. & Mfg. Co.*, 137 N. C. 171, 49 S. E. 106. Where the president of a corporation caused a mortgage owned by it to be foreclosed and executed a deed to the corporation's agent who conveyed to the corporation, the bringing of a suit by the corporation to recover possession of the land amounted to a ratification of his acts, *New England Life Ins. Co. v. Wing*, 191 Mass. 192, 77 N. E. 376. A corporation for "the brewing and selling of beer" may loan money secured by a mortgage to enable the mortgagor to build a saloon for the sale of beer manufactured by the mortgagee, *Kraft v. West Side Brewing Co.*, 219 Ill. 205, 76 N. E. 372.

A deed by a corporation to a director, the latter having voted in the directors' meeting to execute it and having been

needed to make a quorum, is voidable even in the absence of actual fraud and the corporation as to the unimproved parts of the land conveyed is not estopped from disaffirming it because upon other lots the grantee has built houses which could be seen by some of the directors and stockholders, *Mobile Land Imp. Co. v. Gass*, 142 Ala. 520, 39 S. 229. A corporation organized to build and operate a summer hotel and develop certain mineral springs had no power to subdivide certain of its land into lots, sell them and dedicate other parts to the public. A certificate issued by the corporation to an adjoining owner without consideration reciting that such owner was entitled to the privileges of the grounds and lake and the free use of the water for drinking and table purposes was a mere license which the corporation could revoke at any time, *Stacy v. Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546, 79 N. E. 133.

Sales of land by electric light and power companies, water companies, and street railway companies, legalized by Ala. Laws of 1907, No. 725. The sale or mortgage of real estate by corporations receiving bounties from the commonwealth is regulated by Mass. Acts 1907, Ch. 189, amending Ch. 124, Sec. 6 Rev. Laws. Ch. 559, Sec. 13, Laws 1895, regulating the conveyance of real estate by membership corporations is amended by N. Y. Laws 1907, Ch. 177. Titles held and given by foreign corporations are validated by Pa. Laws 1907, Nos. 16, 89, 284. Domestic corporations are authorized to sell their property and conditions of sale are prescribed by Tenn. Acts 1907, Ch. 437.

Acknowledgments before officers or stockholders in corporations, see *ante* §2. The execution and acknowledgment of deeds by corporations are regulated by So. D. Laws 1907, Ch. 2. Sec. 5022 Rev. Codes 1905, regulating acknowledgments by corporations, construed, *Gessner v. Minneapolis*, St. P. & S. S. M. Ry. Co., (N. D. 1906) 108 N. W. 786.

COVENANTS

Statute of limitations as applied to, see *post* §513.
In leases, see *post* §308.

Sec. 45. General and special.

General covenants in a deed of conveyance whether they be expressed on the face of the deed or raised by an implication from the use of the words "grant, bargain and sell," as provided by Missouri Revised Statutes 1899, section 905, are not restricted in their operation by special covenants unless the different covenants are so irreconcilable that they cannot all have their full force, or unless the limited covenant refers to, or is connected with the general covenants in such a manner as to show the intention of the grantor was to restrain the force and effect of the general covenants, *Miller v. Bayless*, 194 Mo. 630, 92 S. W. 482.

Sec. 46. Whether run with the land.

Covenants running with land. A covenant by the grantee that he will maintain a fence between the granted land and other land of the grantor runs with the land, binds the covenantor while he is in possession, and his grantee after him, *Sexaner v. Wilson*, (Ia. 1907) 113 N. W. 941. A covenant of quiet enjoyment and warranty runs with the land and may be sued upon by the heir or assignee in possession when the breach occurs. But one in possession of land long enough to raise a presumption of a deed does not thereby acquire a right of action to sue for a breach of such a covenant made with the presumed grantee, *Deason v. Findley*, 145 Ala. 407, 40 S. 220. A covenant to erect and maintain a retaining wall of stone for the benefit of grantor's remaining land runs with the land and will be specifically enforced after the removal of a wooden wall erected as a substitute therefor with the consent of the grantor, *Flege v. Covington & C. Elevated Ry. and Transfer & Bridge Co.*, (Ky. 1906) 91 S. W. 738.

Covenants not running with land. "A cause of action for breach of a covenant in a deed under which neither title nor possession is transferred does not pass to the grantee of the covenantee by the mere execution and delivery of a deed from the latter to the former, as the covenants in such a deed do not run with the land," *Bull v. Beiseker*, (N. D. 1907) 113

N. W. 870. An agreement not to sell liquor does not run with the land, *Sjoblom v. Mark*, (Minn. 1908) 114 N. W. 746. The mere payment of the purchase price cannot be made a covenant running with the land, so as to bind personally a successor in interest, when the consideration therefor is in the form of negotiable notes in the hands of third parties, *Jackson v. Aripeka Sawmills*, (Fla. 1907) 43 S. 601. Where one purchases a wharf lot, subject to a lease containing a covenant stipulating that the lessor will not be bound for repairs, etc., but agrees that the lessee, at his option, may make such repairs as may be necessary and the lessor will reimburse him therefor to a named amount, the obligation of the covenant does not rest upon the purchaser, being a personal obligation on the part of the original lessor, *Willcox v. Kehoe*, 124 Ga. 484, 52 S. E. 896. An original grant or timber lease from A. was passed by regular transfer to the B. Lumber Co., and by it to the C. Lumber Co. An instrument dated 20 days after this last conveyance was executed by A. to the B. Lumber Co., granting it, for a consideration, an extension of time in which to cut timber, with the privilege of a further extension of another year on certain payments. A. conveyed the land and timber rights to D., after the date of this contract and with notice of it. The B. Lumber Co. failed to exercise its option and as the words "assigns", "successors" or the like, were not used in the contract, the company could not transfer its right; and as the company at the time the contract was made held neither the land nor the timber, there was nothing to which to attach a covenant running with the land. The judgment was in favor of D., *Baker v. Davis*, 127 Ga. 649, 57 S. E. 62.

Sec. 47. Covenants of warranty. Under Mississippi Code 1892, section 2479 *et. seq.* the word "warrant" in a deed constitutes a covenant of possession as well as title, *Allen v. Caffee*, 85 Miss. 766, 38 S. 186. Covenants of warranty are not broken merely because the deed by mutual mistake describes land not intended to be conveyed. The grantee does not take title to the grantor's cause of action for damages under an existing breach of warranty, *Pinckard v. American Freehold &c. Co.*, 143 Ala. 568, 39 S. 350. A deed containing covenants of seizure and general warranty and describing one boundary of the premises conveyed as a 20 foot alley, which

in fact had never been opened, did not constitute a warranty of its existence although both the grantor and the grantee's attorney before the deed was executed thought the way existed, *Fulner v. Bates*, (Tenn. 1907) 102 S. W. 900.

Where a vendee buys land by a description which does not correspond with that by which he sells and upon being sued in eviction calls his vendor in warranty, without alleging an error of description in the title as he bought it, he cannot by oral evidence show such an error, *Pecot v. Prevost*, 117 La. 765, 42 S. 263. A deed was given of "the west 5 acres of lot 12," with the usual covenant of warranty. In an action by the grantee against a third party, it appeared that the third party had title to ninety-three one hundredths of an acre, which was part of the west 5 acres of lot 12. Held, that there was a breach of the covenant of warranty. No monuments or boundaries being given, the description was not simply an estimate of the quantity of land, but the essential and only description of the land conveyed, *Larson v. Goette*, (Minn. 1908) 114 N. W. 840. Where the president of a levee district conveyed land with a general warranty of title "to the extent, however, only of refunding the consideration, or so much thereof as title to which is not in said board of directors," upon failure of title to part of the land the district must return the purchase money actually received irrespective of whether the president had power to enter into a covenant of warranty or not, *Board of Directors of Levee Dist. v. Myers*, 79 Ark. 14, 94 S. W. 716. The possession by one under a written lease and hold over agreement amounting to a tenancy from year to year is a holding under a title paramount to that of the landlord's grantee and constitutes a breach of the covenant of warranty of title in the landlord's deed, *Fortescue v. Columbia R. E. Co.*, (N. J. 1907) 67 Atl. 1024. When the grantors in a deed warranted the title "against all claims and encumbrances, except the dower of Margaret Cain, widow—which claim for dower (the grantee) is to procure without costs to said first parties" it was held that no trust in favor of the widow was created, nor was any undertaking imposed thereby upon the grantee to compel the widow to assert her claim to dower, *Cain's Adms. v. Kentucky & Indiana Bridge & R. Co.*, (Ky. 1907) 99 S. W. 297.

A grantee in a deed containing a covenant of warranty of the right to cut timber, cannot, the timber having actually

been sold to another previously, cut the timber, thereby voluntarily incurring the penalty imposed by Alabama Code 1896, section 4137, and hold his grantor for the penalty, *Turner v. Lawson*, (Ala. 1905) 39 S. 755.

Sec. 48. Covenants against incumbrances—Taxes. A covenant against incumbrances runs with the land but does not support an action until actual damages are suffered by the owner who is obliged to extinguish the incumbrance, *In re Hanlin's Estate*, (Wis. 1907) 113 N. W. 411. Where without consideration the legal title to land is conveyed by the holder to the beneficial owner at his direction, such holder of title is not bound to pay an assumed debt by which the beneficial owner acquired title and is not liable on the covenant against incumbrances for failure to do so, *Deaver v. Deaver*, 137 N. C. 240, 49 S. E. 113. Where a vendor contracted to convey free from incumbrances on July 1, 1904, but could not deliver possession until at least April 1, 1905, because of a lease from year to year created by the acceptance of a month's rent from a tenant who held over after the expiration of his lease, the vendee could deduct from the purchase price the depreciation, if any, caused by the incumbrance. The loss caused by fire during the period also fell upon the vendor, *Eppstein v. Kuhn*, 225 Ill. 115, 80 N. E. 80.

Taxes, when lawfully levied, constitute a paramount lien on the land assessed, and a vendee of land on which his vendor has failed to pay the current taxes at the time fixed by law, as by the covenant of warranty she was obliged to do, is not required to sit idly by and permit his land to be sold, but may, immediately upon default, pay off the tax lien, and recover of his vendor the amount which he has thus been compelled to expend for the protection of the title, which she had warranted, *Swinney v. Cockrell*, 86 Miss. 318, 38 S. 353. A grantor in a deed with a covenant that the premises are free from incumbrances and a special warranty against them cannot recover from the grantee a tax assessed prior to the conveyance by proof that its payment was part of the consideration for the deed, *Edison Electric Ill'g Co. v. Gibby Foundry Co.*, 194 Mass. 258, 80 N. E. 479. To show that there has been a breach of a covenant against incumbrances by reason of a tax sale there must be proof that the tax was a lien on the land, was lawfully levied, and that a valid title passed by the

tax deeds, *White v. Gibson*, 146 Mich. 547, 109 N. W. 1049.

Where in 1895 street commissioners, acting under Massachusetts St. 1894, p. 462, c. 416, laid out a street extension, but as the work of construction was not done in accordance with the statute the abutters were not liable for betterment assessments, it was held that a covenant against encumbrances in a deed of abutting land executed in 1897, was not broken although under the St. 1902, p. 439, c. 527, authorizing assessments for work completed with the next preceding years, the commissioners subsequently assessed the land conveyed, *Maloy v. Holl*, 190 Mass. 277, 76 N. E. 452.

Sec. 49. Eviction by paramount title. Where a vendee is evicted by the holder of a paramount title from wild lands insusceptible of producing rent, and no rent is demanded or paid, the measure of damages is the principal sum paid, with legal interest thereon, *Yazoo R. Co. v. Barrow & Banister*, 89 Miss. 808, 42 S. 345. A tenant who takes a five year lease from a life tenant and upon the death of the life tenant is ejected by the owner of the fee within the five year period can sue the life tenant's administrator for breach of the covenant of quiet enjoyment contained in the lease, *Duker's Admr. v. Kaelin*, (Ky. 1906) 90 S. W. 959.

Sec. 50. Actions on breach of warranty.

When action arises. A right of action upon a covenant against incumbrances arises upon evidence of an incumbrance, irrespective of any knowledge on the part of the grantee, or of any eviction of him, or of any actual injury it has occasioned him. The damages, where the incumbrance is a ten months lease, are the rental value of the premises during the currency of the lease, *Brown v. Taylor*, 115 Tenn. 88 S. W. 933. A count in a complaint for breach of a warranty against incumbrances which alleged no incumbrance, but the existence of an outstanding paramount title when the deed was executed, was bad, *Henderson v. H. L. Berry Co.*, 145 Ala. 404, 39 S. 662. A purchaser who has not even been threatened with eviction, and shows no paramount title to any part of the land, cannot annex property belonging to the seller as an equivalent to the part of her own purchase as to the title of which she has doubts, nor obtain a reduction of the purchase price, *Lanphier v. Adler*, 118 La. 511, 43 S. 146. The cause of

action for breach of a covenant of full warranty accrues when the grantee pays a judgment obtained in foreclosure proceedings by a prior mortgagee. The grantee is not bound to wait until he is actually disseised, *Scoggin, v. Hudgins*, 78 Ark. 531, 94 S. W. 684. An action for the breach of a covenant of seisin may be maintained although there is no eviction or threatened litigation, and if the parties admit they had no title to one of the tracts when the deed was executed, there is an admission of the breach of covenant requiring no proof thereof, *Eames v. Armstrong*, 142 N. C. 506, 55 S. E. 405.

Parties. Consideration moving to one only of four co-warrantors of title in a deed is sufficient to make the covenant enforceable against them all, *Tucker v. Butterweck*, 50 Fla. 442, 39 S. 480. Where a purchaser of land in Louisiana part of which was in the adverse possession of a third party joined both the man in possession and the seller as defendants he can only recover from the seller the damages for breach of his covenant of warranty. The court will not order the seller to put the buyer into possession, because the seller could not do it, *Clapham v. Clayton*, 118 La. 419, 43 S. 36. The lands of the deceased while held by the heirs may in equity be subjected to sale for payment of a claim arising out of a breach of warranty contained in a deed executed by the deceased, although the breach did not occur until after the expiration of the two year period within which claims against the estate must be proved in the probate court, *Scoggin v. Hudgins*, 78 Ark. 531, 94 S. W. 684.

Damages. In an action to recover damages due to the false representation by the grantor that grantee might have a right of way over a public alley, which never in fact existed, and on a breach of warranty in the deed, plaintiff is entitled to recover the difference between the market value of the land with a private way (which will be implied) and that with a public one, *Talbert v. Mason*, (Ia. 1907) 113 N. W. 918.

Prior litigation. A grantee, who has sold timber to a purchaser who was forbidden by a third person to cut it because the latter claimed title thereto, was justified in at once bringing ejectment against the third person. Upon being defeated in that action because the grantor failed to supply proper evidence of title, the grantor was liable to the grantee in an action for breach of his covenant of warranty, *Hubbard v. Stanaford*, (Ky. 1907) 100 S. W. 232. When a grantee in a

full warranty deed is sued for dower and after notifying the grantor to defend the suit upon his failure so to do defends it himself, in a subsequent suit upon the covenant the grantor is bound by the judgment in the dower action even although erroneous. Upon the suit on the covenant all of the costs recovered by the dowress can be recovered by the plaintiff, but as a sale therein to determine the amount of the dower did not constitute a total eviction damages cannot be allowed upon the theory of a total failure of title, *Olmstead v. Rawson*, 188 N. Y. 517, 81 N. E. 456.

Who may be sued. Provided a piece of real estate has been conveyed by numerous warranty deeds although it has been incumbered by a mortgage, the last purchaser of the property has a right to sue any of the previous warrantors and each warrantor has no right of suit against the previous warrantors until a recovery has been made from him, *Thompson v. Richmond*, (Me. 1906) 66 Atl. 649.

CROPS AND EMBLEMENTS

Rights to crops as between landlord and tenant, set *post* §300.

Sec. 51. In general. Lessee's crops not to be taken for debt of lessor, La. Acts 1906, No. 100. Kentucky Statutes of 1903, sections 3862 and 3863, as to emblements construed and it was held that thereby the common law rule that the executor of a tenant for life was entitled to the growing crops is changed, *Devers v. May*, (Ky. 1907) 99 S. W. 255. A provision in a will devising a plantation that if the testator die before Jan. 1, 1901, the rents for 1900 be paid to his executors did not, when he survived that date, indicate that rents accruing during the year he died and the crops should not pass to the executor under Mississippi Rev. Code 1892, sections 1881 and following, *Gordon v. James*, 86 Miss. 719, 39 S. 18. Where the Supreme Court reversed a prior decision, and a tenant may have acted upon such prior opinion by advice of counsel, in removing crops, selling the same and retaining the proceeds, claiming damages through the failure of the landlord to comply with the contract, a new trial was ordered

with notice that the new construction of the statute would be applied to future cases, *State v. Bell*, (N. C. 1904) 49 S. E. 163.

CURTESY AND DOWER

See further, Husband and Wife.

Statute of limitations as applied to, see *post*, §517.

Sec. 52. Existence and character. A wife's dower is a purely contingent interest during the life of her husband and does not give her standing to litigate the question whether he holds land as absolute owner or as mortgagee after it has been determined in a proper proceeding in which the husband is a party, *Stitt v. Smith*, (Minn. 1907) 113 N. W. 632. For facts upon which a wife was held to have dower in partnership property, see *Chase v. Angell*, 148 Mich 1, 108 N. W. 1105.

Curtesy. Alabama Code 1896, section 2534, as to curtesy applies to land inherited by a deceased wife from her father, *Dake v. Sewell*, 145 Ala. 581, 39 S. 819. The Arkansas Constitution of 1874 abolished the estate of curtesy initiate, leaving only curtesy consummate. This latter estate does not give the holder thereof an insurable interest in his wife's real estate, *Loyd v. Planters Mut. Ins. Co.*, 80 Ark. 486, 97 S. W. 658. Kentucky Statutes, section 2132, which gives a surviving husband a one-third interest in his wife's land for life, construed, *Hall v. Craft*, (Ky. 1907) 100 S. W. 236. Kentucky Gen. St. Chapter 52, art. 4, section 1, as to a husband's rights of curtesy, construed, *Williams v. Coffman*, 31 Ky. Law Rep. 151, 101 S. W. 919. There is no curtesy in the interest of a vendee in lands of the state held under certificates of purchase, *In re Grandjean's Estate*, (Neb. 1907) 110 N. W. 1108. Sec. 5544, B. & C's Ann. Codes, defining and regulating the disposal of curtesy is amended by Ore. Laws 1907, Ch. 87. Missouri Rev. Statutes, 1899, §4335, conferring upon a married woman power to contract debts as a feme sole construed in connection with §4340 giving her possession of her separate real estate, and it was held that the result of the legislation is to leave the husband's right of curtesy free from his wife's debts, but, as he loses his common-law right of possession

to her land during coverture, it does not become consummate until her death. The statute is prospective, not retrospective, *Myers v. Hansbrough*, 202 Mo. 495, 100 S. W. 1137.

Dower. The right of dower attaches to growing trees, *Delaney v. Manshum*, 146 Mich. 525, 109 N. W. 1051. Under the Alabama statutes a widow who has no children and a separate statutory estate greater in value than her dower interest, but of less value than the personal estate, is entitled to dower, *Tyson C. J. and Denson J. dissenting, Guice v. Guice*, (Ala. 1907) 43 S. 199. Under Ky. Statutes 1903, section 2138, permitting a widow to hold the mansion house free of charge until dower is assigned to her, a widow who did not join in her husband's deed of assignment for the benefit of creditors may claim her homestead and take dower in other lands free from liability for rent, but the creditors may sell the property subject to her rights, *Potter v. Potter's Receiver*, 31 Ky. Law Rep. 137, 101 S. W. 905. Mississippi Rev. Code 1892, section 4496, authorizing a widow to elect to renounce the provision made for her in her husband's will, construed, *Gordon v. James*, 86 Miss. 719, 39 S. 18. Various Missouri Statutes as to dower construed, *Christman v. Linderman*, 202 Mo. 605, 100 S. W. 1090. Various sections of the Missouri Statutes as to the right of a widow to elect to take dower or a child's share, and her right to occupy the mansion house free of rent before any assignment thereof, construed, *Keeney v. McVay*, (Mo. 1907) 103 S. W. 946. Revised Statutes §2832 and §2826, relating to a wife's right to dower, were construed, *Hilton v. Thacher*, 31 Utah 360, 88 Pac. 20.

Statutes. A surviving husband or wife is given an election to retain statutory rights in property devised, instead of claiming under the will, by Ind. Laws 1907, Ch. 48. Kentucky Statutes 1903, section 1404, as to a widow's renunciation of her husband's will, and section 2067, as to renunciation by a devisee construed, *Bottom v. Fultz*, (Ky. 1907) 98 S. W. 1037. As to the rights of a widow to waive the provisions of her husband's will in Massachusetts, see *Holmes v. Holmes*, 194 Mass. 552, 80 N. E. 614. Missouri Revised Statutes 1899, section 2938, providing for the interest of a widower in his wife's property, construed, *Gilroy v. Brady*, Mo. 93 S. W. 279. Curtesy and dower are abolished by N. Mex. Acts 1907, Ch. 37, Sec. 17; and by N. D. Laws 1907, Ch. 136, amending Sec. 4082 Rev. Codes 1905. Shannon's Tennessee Code, section

4146, as to the rights of a widow to dissent from the provisions of her husband's will, construed, *Chamness v. Parrish*, (Tenn. 1907) 103 S. W. 822.

Priorities. A purchaser's wife is not entitled to dower or homestead against a vendor's lien, *Matney v. Williams*, (Ky. 1905) 89 S. W. 678. A husband owned land, and after a purchase money mortgage was signed by himself and wife, he alone gave another mortgage on the property, and the second mortgage only was subject to the wife's dower, when he owned no other property, *Shakleford v. Morrill*, 142 N. C. 221, 55 S. E. 82. When certain land is set apart as a year's support to the widow and minor child and the child moves away and marries, the widow may sell the land, giving a title in fee simple, and the child has no right to a share of the proceeds, *Bridges v. Barbree*, 127 Ga. 679, 56 S. E. 1025. No dower was allowed, conveyance being made before coverture in ex parte Wallace, 73 S. C. 109, 52 S. E. 873. The deceased conveyed his interest in the partnership and real estate which he owned with his sons to them a number of years before his marriage with his second wife, and he recorded the deeds two days before the marriage. The second wife did not know of the deeds but they were valid, *Wilson v. Wilson*, (Utah 1907) 89 Pac. 643.

In remainder. A widow does not take dower in a vested remainder, *Gray v. Whittemore*, 192 Mass. 367, 78 N. E. 422. Although a remainderman held possession of land during the lifetime of the life tenant, it was not seisin sufficient to bestow dower rights on his wife, *Redding v. Vogt*, 140 N. C. 562, 53 S. E. 337. Where a wife was never in possession of land and died before the termination of a life estate to which her remainder was subject, her surviving husband is not entitled to curtesy, *Collins v. Russell*, 184 N. Y. 74, 76 N. E. 731.

In equities. A widow is not entitled to dower in land held by her husband in trust for her, *Barker v. Smiley*, 218 Ill. 68, 75 N. E. 787. Although the grantor in a trust deed granted property to a trustee to be held for his benefit and use during life with the right to direct a conveyance by the trustee to anyone he should direct and the residue of the estate after his death to be divided up among his heirs, the grantor still possessed an equitable estate in fee simple, and his wife was entitled to dower therefrom, *Meyer v. Barnett*, 60 W. Va. 467, 56 S. E. 206. When a husband while separated

from his wife caused lands owned by another to be conveyed to his sister in trust for himself and died after his wife had obtained an absolute divorce upon the ground of adultery, the wife could not recover dower therein under Mass. Rev. Laws, c. 152, section 24, and c. 132, section 1. No statute in Massachusetts gives a wife a dower in land to which her husband held only an equitable title, *Seamon v. Harmon*, 192 Mass. 5, 78 N. E. 301.

Instantaneous seisin. Upon the evidence it was held that a certain mortgage was given as part of the purchase price and the mortgagor having had only instantaneous seisin, his widow was not entitled to dower in the land, *Harrow v. Grogan*, 219 Ill. 288, 76 N. E. 350.

Sec. 53. Various rights of surviving spouse. Property held by husband and wife as joint tenants on the death of one passes to the other in spite of any attempt of the deceased to transfer it by will, *Bassler v. Rewodlinski*, 130 Wis. 26, 109 N. W. 1032. Under Mass. Pub. St. c. 125, section 1, as to the descent of real property, a surviving husband was not an heir at law of his deceased wife, *Gardner v. Skinner*, 195 Mass. 164, 80 N. E. 825. As to effect of conveyance by widows and children, of real estate of deceased persons who have left second wives surviving them, see Ind. Laws 1907, Ch. 47. Mass. Pub. Sts. c. 124, section 1, as to the rights of a husband surviving his wife, who leaves no issue, in her real estate, *Gray v. Whittemore*, 192 Mass. 367, 78 N. E. 422. Under Burns' Ann. Indiana St. 1901, sec. 2562 et seq, a widow takes the fee in one-third of land conveyed by her husband where she did not join in the conveyance, so that where she, after his death, conveys to her husband's grantees, his children by a former marriage do not inherit anything from her, *Fry v. Hare*, 166 Ind. 415, 77 N. E. 803. The surviving spouse does not inherit in usufruct the estate of the deceased spouse and the usufruct, therefore, is not subject to the Louisiana inheritance tax, *Succession of Marsal*, 118 La. 212, 42 S. 778. If a man lives with two wives, and deeds real estate to his illegitimate wife and children, they are only entitled to retain one-fourth of the total value of the husband's estate from the legal wife and children, according to Civ. Code 1902, sec. 2368; but they may obtain title by adverse possession during the life of the husband as against the legitimate wife and children, when the

latter had notice, *Williams v. Halford*, 73 S. C. 119, 53 S. E. 88. A widow under Missouri Rev. St. 1899, sections 2939 and 2941, is entitled to take one-half of the real and personal estate belonging to the husband, at the time of his death, absolutely, subject to the payment of his debts, or to take one-third part of all the land whereof the husband was seized of an estate of inheritance, at any time during the marriage, and to which she has not relinquished her right of dower, for and during her natural life, *Crowl v. Crowl*, 195 Mo. 338, 92 S. W. 890.

A will describing all testator's land accurately and expressly limiting the widow's estate therein, providing for the erection of tombstones from a sale of part of that land on the graves of himself, his widow and his children, and directing that at his widow's death the land be divided among his children, shows that testator's intent is to give the widow a life estate in place of her distributive share, *Parker v. Parker*, 129 Ia. 600, 106 N. W. 8.

Rent. Various Kentucky Statutes as to the rights of a surviving spouse to rent accruing under leases made by the decedent, construed, *Eastwood v. Sisk*, (Ky. 1907) 102 S. W. 828.

Allowance. In small estates the real estate may be awarded to the widow instead of being sold to pay her allowance, Col. Laws 1907, Ch. 250. A widow who took under her deceased husband's will all his property for her life, except a piece of land worth only \$160, and remained in possession of the property so devised for fifteen years without dispute, thereby waived her statutory widow's allowance of \$500, under the Indiana Statutes, *Bowman v. Olrick*, 165 Ind. 478, 754 N. E. 820. Under Revisal 1905, §3098, a year's provision was laid off to a widow resident here to the amount of a fund or debt due her husband, by the defendant; said husband having domicil and dying in another state. The statute [Revisal 1905, §3091] gives a year's support to "every widow of an intestate" or one who has dissented from her husband's will. The technical rule that her husband's domicil is the wife's domicil is well settled, but the fiction of domicil does not control as to realty nor as to personalty, except in the distribution of the surplus; the year's provision not being in the nature of such distribution but a humane provision of urgency taking precedence of all other claims against the estate should be allotted to the widow if she is actually and

bona fide resident here. "It would be a denial of the intent of the statute to send this widow and her two children, resident here, across the continent to obtain this debt, which they instantly need, because of the lore in the books, correct technically, but untrue here as a fact, that the wife resides where her husband does," *Jones v. Layne*, 144 N. C. 600, 57 S. E. 372.

A spouse who marries a second time, under Louisiana Civil Code, section 1753, forfeits to the children of the first marriage all donations made by the deceased spouse before marriage, *Didlake v. Cappel*, 116 La. 844, 41 S. 112.

Sec. 54. Release or loss of curtesy and dower—Lien on.

The method by which a married woman may bar her dower is prescribed by Ore. Laws 1907, Ch. 326. Dower may be released by a quit claim deed subsequent to the separate deed of the husband, *Fowler v. Chadima*, 134 Ia. 210, 111 N. W. 808. *Burns' Indiana Ann. St. 1901*, Section 2669, as to the vesting of a wife's inchoate right of dower upon a judicial sale of her husband's land during his lifetime, construed, *Green v. Estabrook*, 168 Ind. 123, 79 N. E. 373; *Staser v. Gaar, Scott & Co., et al*, 38 Ind. App. 696, 79 N. E. 404. In a petition for partition, it was held that a deed by a husband, executed after the passage of the married woman's act of 1866, p. 146, conveying land owned by the wife to which he claimed his marital rights had attached before the passage of that act, was good, as color of title, although the property had not been reduced to possession by him, *Arnold v. Limeburger*, 122 Ga. 72, 49 S. E. 812. A prayer to set aside a relinquishment of dower, complaining of undue influence by the husband and others, being without separate examination, but in which the grantee is not charged with collusion was refused, the certificate of the officer and the signature of the dowress being conclusive, *Campbell v. Harris Lithia Springs Co.*, 74 S. C. 282, 54 S. E. 378. A gift by a husband to his wife of land does not of itself bar her dower in the remainder of his land, but an equitable jointure which puts the widow upon her election must be either expressly in lieu of dower or the same instrument must make such a disposition of a part of the estate as is clearly inconsistent with her taking dower therein, *Cowdrey v. Cowdrey*, (N. J. 1907) 67 Atl. 111.

Adverse possession. Under Comp. Laws 1897, Sec. 8918 and 8938, a non-resident widow is barred of her dower by

the adverse possession of lands of her husband; she is entitled to dower in lands of which her husband had the légal right to possession, though he was not in actual possession, *Putney v. Vinton*, 145 Mich. 219, 108 N. W. 655.

Desertion. Husband deserted by wife or living apart from her for a justifiable cause may convey real estate as if sole; widow may not waive provisions of his will, Mass. Acts 1906, Ch. 129. In a case concerning dower rights, the widow may testify whether her desertion of her husband until his death was voluntary or compelled by cruel and inhuman treatment, and Revisal 1905, s. 1631 does not apply, *Hicks v. Hicks*, 142 N. C. 231, 55 S. E. 106.

Fraudulent attempt to bar dower. The husband conspired with his son to defraud his wife of her dower rights, and he made a promissory note to a fictitious person and his land was sold under a judgment for the note and the son obtained title to it. The wife has a right to maintain ejectment proceedings within a reasonable time after her husband's death if she did not forfeit her rights under the statute of limitations, *McKelvey v. McKelvey*, 75 Kan. 325, 89 Pac. 663. A husband fraudulently conspired to defeat his wife's right of dower in a property by a foreclosure sale, the husband stating to those present at the time of the sale that it was held merely to defeat his wife's dower rights and the purchaser paid \$18,000 to the husband while the foreclosure sale was only for \$4,300 and the husband had ample funds with which to pay the mortgage, and the court holds the wife's dower was not barred by the sale, *Turner v. Kuehnle*, 70 N. J. Eq. 61, 62 Atl. 327.

Oral release. Although a husband orally relinquished his curtesy rights to his wife which were allowed him by B. & C. Comp. §§5544, 5547, he was not estopped from claiming his curtesy interest after his wife's death, *McCrary v. Biggers*, 46 Ore. 465, 81 Pac. 356.

Dower not lost. Dower is not lost by an attempted conveyance of the land in question by an agent with power of attorney but acting in violation of his instructions, *Britt v. Gordon*, 132 Ia. 431, 108 N. W. 319. When a widow had a right of dower in a coal lease, she could not be deprived of her rights by the executor making out a new lease to himself, if the deceased had regarded the old lease as valid and had received the royalties thereunder regularly until his death, *In re Murray's Estate*, (Pa. 1907) 65 Atl. 675. As to purchas-

ers with notice, a conveyance of land, absolute on its face, but intended as a mortgage, does not deprive a widow of her dower under Cobbey's Ann. Stat. 1903, Sec. 4903-4906, *Wild v. Storz Brewing Co.*, (Neb. 1906) 108 N. W. 145. Where a wife has entered into an agreement releasing her dower rights for a valuable consideration with the understanding that she should not contest a divorce suit by the husband, it was invalid since it was contrary to public policy. If the consideration for the release of the dower rights granted by Rev. St. 1898, s. 2826, were grossly inadequate and the real amount of the husband's property were concealed from the wife, the relinquishment was void, *Bell's Estate, In re*, 29 Utah 1, 80 Pac. 615. A. agreed to sell her dower rights to B. for \$6,000, and under the mistaken advice of her attorney she thought that she was only entitled to the income of the \$6,000, so she executed a writing instructing him to invest it in mortgages or improved property and pay the principal at her death to her deceased husband's children; but the clause concerning the children was void although more than twenty years had elapsed and she had a right to receive in her own right the whole of the principal, *Williams v. Merriam*, 72 Kan. 312, 83 Pac. 976. When in order to defeat his wife's right of dower the husband procures the foreclosure of a mortgage on property paying all expenses for the foreclosure and then has his attorney purchase it from the sheriff, and he subsequently completes a sale of the property to the purchaser for whom his wife had refused to sign a deed, the sale is void as to the wife's dower rights and she is entitled to draw interest on one-third of the sale price of the property above the mortgage after her husband's death, *Turner v. Kuehnle*, 70 N. J. Eq. 371, 64 Atl. 478.

Lien on curtesy. Where a husband and wife joined in executing notes and a mortgage of land owned by the wife it was held that after the wife's death the land having descended to the children subject to the husband's curtesy the mortgagee is entitled to a lien on the curtesy interest as well as that of the remaindermen. The curtesy interest should be sold first and the remainder only in case the curtesy proves insufficient to pay the mortgage, *Buckley's Assignee v. Stevenson*, (Ky. 1907), 99 S. W. 961.

Sec. 55. Value and amount. Under Kirby's Arkansas

Digest, Section 2709, if a husband leaves a widow and no children, she takes in fee simple one-half the land of which he died seised, if a new acquisition, *Drinkwater v. Crist*, (Ark. 1907) 103 S. W. 733. As to the rights of a childless second wife under Burns' Indiana Rev. St., Section 2640, see *Griffis v. First Nat. Bank of Connersville, Ind.* 79 N. E. 230. A widow under a judgment decreeing her dower in Kentucky land took an estate of freehold for life in one-third, thereby became a tenant in common with the owner of the other interest, and when she entered her entry inured to the benefit of all in interest and was amicable to their title. Therefore when she sold her interest the purchaser did not hold adversely to the other owners. But when the purchaser later purported to convey in fee simple his grantees who took possession of the whole tract held adversely to the true owners and set the statute of limitations running, *Bloom v. Sawyer*, (Ky. 1905) 89 S. W. 204. A clause in a will providing that the testator's estate was to be subject to the widow's dower and thirds, did not give an absolute one-third interest in the real estate, and her testimony to the effect that the testator told her she should have one-third absolutely or \$10,000 if his estate amounted to \$30,000 was not admissible; the widow was only entitled to what she would receive by the regular legal interpretation of the words "dower and thirds," or a life interest in one-third of the real estate and one-third absolutely of the personal estate, *Shipley v. Mercantile Trust & Deposit Co.*, 102 Md. 649, 62 Atl. 814.

Sec. 56. Allotment or assignment—Conveyances. Procedure for the setting apart of dower when wife is insane prescribed by Ark. Acts of 1907, No. 393. Upon the evidence it was held that no parol assignment of dower and homestead had been made and a lease, therefore, executed by a surviving spouse to a person other than the owner of the fee, was invalid, *Chicago Ry. v. Kelly*, 221 Ill. 498, 77 N. E. 916. Where land belonging to the estate of the deceased is measured off by commissioners as dower for the widow, it is not necessary that an order of court should assign the land to her as dower, when all persons concerned acquiesce, and she enters into possession of the land, *Callaway v. Irvin*, 123 Ga. 344, 51 S. E. 477. A widow accepted dower in the land of which her husband died seised and possessed. An application for home-

stead was made and granted to the widow and children, all minors. Some improvements were made by her and her children upon the homestead tract. The widow having taken dower "cannot be considered heir at law of the homestead lands," she "cannot maintain action for partition against her children of the homestead set apart to her and them;" nor can she claim even the right to live upon the homestead, *Kennedy v. Kennedy*, 74 S. C. 541, 54 S. E. 773.

Rights before assignment. A widow may maintain a suit in equity, without joining the other tenants and before her dower has been assigned to restrain the commission of waste, *Delaney v. Manshum*, 146 Mich. 525, 109 N. W. 1051. Until dower is assigned the right thereto is a mere chose in action and a widow cannot maintain trespass quare clausum for an injury done to the land, *Munsey v. Hanly*, 102 Me. 423, 67 Atl. 217. Dower, after the death of the husband and before assignment, is in nature a right in action, not an interest or estate in realty, and is unassignable, except by way of extinguishing release to the terre tenant. The widow therefore is not a necessary party to a bill by children to compel the surrender by a third party of a void deed given him by the deceased, *Francis v. Sandlin*, (Ala. 1907) 43 S. 829.

What set off. Under Code 1873, Sec. 2440 and 2452, a widow having a life estate in testator's realty and no devise in lieu of dower will be entitled to both the devise and dower, *Warner, Hamill*, 134 Ia. 279, 111 N. W. 939. When a husband sells land and dies, the purchaser is entitled to have the widow's dower taken from other lands belonging to the husband if there is sufficient property remaining including the residence, *Harrington v. Harrington*, 142 N. C. 517, 55 S. E. 409. A widow could not claim a dower in other lands owned by her husband when the dwelling house was worth one-third or more of the estate, as the statute explicitly (Code, §2103) provides, "in which third part shall be included the dwelling house in which her husband usually resided," *Howell v. Parker*, 136 N. C. 373, 48 S. E. 762.

Conveyances. Where a husband and wife executed a deed of trust to a trustee, the wife conveying her dower interest for \$1,000, and the trustee subsequently executed an instrument granting an equitable estate to the husband and his heirs, the wife's right of dower in the equitable estate was not conveyed, in the absence of any proof that it was a rea-

sonable and proper post-nuptial settlement, and the burden of proof was on the heirs of the husband, *Radley v. Radley*, 70 N. J. Eq. 248, 62 Atl. 195. The reversion in lands, out of which dower is assigned, may be levied upon and sold at the instance of the creditors of the estate of the husband, *Rusk v. Hill*, 121 Ga. 378, 379, 49 S. E. 261.

DANGEROUS PREMISES

See Negligence—Highway.

DEDICATION

Sec. 57. What constitutes in general. A common law dedication does not require a grantee or some well-defined body politic for whose benefit the dedication is made. It is sufficient that the owner of the title has clearly manifested an intention to set apart for public use the land and that the public has enjoyed the use in such a manner and for such a time that public and private rights will be materially affected by an interruption of that enjoyment, *Nelson v. Randolph*, 222 Ill. 531, 78 N. E. 914. The General Assembly of Louisiana may change the destination of property which has been dedicated to public use whenever such change becomes of public advantage. When by a statute certain state property is "dedicated to the people of New Orleans, for public use, for public park, or amusement park, purposes," the beneficiary is the public at large, since those who are not so may become people of New Orleans, if, and when, they choose, or they may avail themselves of the dedication without becoming people of New Orleans, *Saucier v. New Orleans*, 119 La. 179, 43 S. 999. The evidence was examined and held to show no dedication of land in *Como v. Pointer*, 87 Miss. 712, 40 S. 260.

Sec. 58. Evidence of. Upon the evidence it was held that a city had not acquired by prescription a strip of land as part of a public highway, *Chicago v. Galt*, Ill. 79 N. E. 701. "When the owner of land lays it out into lots and streets and

records a plat thereof, it is not necessary in order to show an acceptance by the public to prove a continuous use for a time sufficient to constitute a way by prescription," *Brewer v. Pine Bluff*, (80 Ark. 489) 97 S. W. 1034. Although an alley way has been used by the public under 20 years, it was no evidence of dedication if the owner has not had a plan made showing the alley on it and has not mentioned it in deeds to the owners along one side of the alley way, especially when the original parties to the deeds have died, and the uncertain memory of witnesses was not relied on although they testified there was a dedication, *Milliken v. Denny*, 141 N. C. 224, 53 S. E. 867. When a public passway had run substantially along the route in dispute but its location had from time to time been changed, as its condition and the encroachment of fencing required, it was held that no actual or implied dedication by the owners, or public user as of right or under a claim of right for such a period as raises a prescription of a public acceptance, had been shown, *Potter v. Magruder*, (Ky. 1906) 97 S. W. 732. A memorandum on the books of a company selling land, the deed to which was subsequently destroyed by fire at the burning of the registry, said the land was conveyed with the exception of land laid off for the streets D. & E. extending through the same. When the deed from a subsequent owner of the property contained no reservation for streets, and the whole of the land was assessed for taxation in bulk without taking out the streets, the use of the said land by the public was regarded as permissive and the memorandum on the books of the original land company was not sufficient evidence of dedication, therefore, the owners of the land might close the streets to the public, *Town of West Point v. Bland*, 106 Va. 792, 56 S. E. 802.

Sec. 59. Of highways. Evidence held to show dedication and acceptance of a public road, *Eldridge v. Collins*, (Neb. 1905) 105 N. W. 1085. Where no improvement of a road is necessary to fit it for travel, dedication may be presumed without it, *Brandt v. Olson*, (Neb. 1907) 113 N. W. 151. The building of fences and planting of trees on a line of travel for the purpose of inducing the public to follow the section line and the use, by the public, of the space so enclosed for nearly 20 years as a highway, constitutes a dedication of the land and its acceptance by the public, *Cassidy v.*

Sullivan, (Neb. 1906) 106 N. W. 1027. Where the owner of a tract of land grants a right of way over it with the condition that a street be built there to be open to the public use, it cannot be subsequently closed; and an injunction will lie against any one erecting a gate or placing any obstruction therein, Bent v. Trimboli, 61 W. Va. 509, 56 S. E. 881.

When a trail has been used over the public lands for a long time, a right of way has been acquired under Rev. St. U. S. s. 2477, (U. S. Comp. St. 1901, p. 1567) and a settler has no right to fence it in within 20 feet but he must leave a reasonable width not less than 60 feet. See B. & C. Comp. s. 4790 (Sess Laws 1903, p. 267), Montgomery v. Somers, (Ore. 1907) 90 Pac. 674. Under Illinois Laws 1871-2, p. 675, Section 1, as amended, providing that all roads used by the public as a highway for a certain period, are public highways, the intention of the former owner is immaterial in determining whether a road has become a public highway; upon the evidence it was held that the road in question had been used by the public for the statutory period (3 judges dissenting), Peotone v. Ill. Cent. R. Co., 224 Ill. 101, 79 N. E. 678.

When the owner of land orally dedicated a strip of it to a city for a street but he and his wife never joined in a conveyance thereof to the city, after twenty-five years of continuous use as a street the heirs of the wife are estopped to deny that the donation was properly made, Dulaney v. Figg, (Ky. 1906) 94 S. W. 658.

An owner who signed a petition to the mayor and council of the city requesting them to grade and gravel a street through his property thereby dedicated such portion to the city although after the ordinance authorizing the work had been passed he erased his name from the petition and wrote another letter to the council asking them not to do the work at that time on account of a tight money market, Terrell v. Hart, (Ky. 1906) 90 S. W. 953.

No intention by a railroad company to dedicate a street is shown by proof that the public has used a way over its tracks and unfenced lands for about 40 years, when all this time the company maintained the way and its use by its patrons and the public was merely permissive, Cincinnati & C. Ry. Co. v. Roseville, 76 Ohio, 108, 81 N. E. 178.

Of strip. When a church vestry authorizes the warden to restrict the front line of the church to that of other prop-

erties in the block and moved back the wall six feet, it amounted to a dedication of this strip, so that a subsequent purchaser could not recover damages for a taking of land amounting to five feet on the street line, *Forsythe v. City of Philadelphia*, 211 Pa. 147, 60 Atl. 578.

Acceptance. A valid dedication of land for street purposes may be made to a city although not at the time within its limits and the municipal authorities did not at once open a street over it, *City of Meridian v. Poole*, 88 Miss. 108, 40 S. 548. When land was dedicated to a city for use as a cemetery and the city made a map thereof showing alleys and roads, according to which they sold lots, such streets were dedicated to the public, *Weiss v. Taylor*, 144 Ala. 440, 39 S. 519. The owner of land opened a street, and paved it, and thereafter the city patrolled it, cleaned and repaired it as a public street and it was so used for twenty years. The owner was not entitled to close it as its use by the public amounted to a dedication, *Canton Co. v. Mayor of Baltimore*, (Md. 1906) 65 Atl. 324. Gen. Laws 1877, c. 100 s. 7, provided that a dedication of streets should not be accepted by a city unless three quarters of the members of the city council had approved of the acceptance. The streets submitted for dedication by the defendant just missed the necessary three quarters vote and although the city took possession and kept the streets in good condition it had no right to prevent the grantor's taking mineral from beneath the street, as the dedication was not legally accepted as provided by law and the city had no rights in it except a common law easement acquired by use, *City of Leadville v. Coronado M. Co.*, 37 Colo. 234, 86 Pac. 1034.

Sec. 60. Open spaces. The evidence was examined and held to show no dedication of land as a public park in *Wilson v. Lakeview Land Co.*, (Ala. 1905) 39 S. 303. The owner of land near Louisville, Kentucky, in 1868, sold a large tract to several persons jointly and by a written agreement executed at the same time covenanted that "Elliott Square" adjacent to the tract sold should be held by him as a public square and conveyed to the city of Louisville when included in the city limits, and in 1895 the property was taken within the city limits and in 1900 accepted by the city council in accordance with the 1868 grant. It was held that the 1868 agreement created a valid trust for the benefit of the city and that the

city's delay until 1900 was not such as to deprive it of the right of acceptance, *Elliott v. Louisville*, (Ky. 1906) 90 S. W. 990. The word "Park" written on a section of land contained in a large recorded plat of city lots, in accordance with which many lots were sold, implies a dedication thereof as a public not a private park. The case contains a very valuable discussion of the whole subject of dedication, *Florida E. Coast Ry. Co. v. Worley*, 49 Fla. 297, 38 S. 618.

Sec. 61. By maps and plats.

Creation of easements by filing maps and plats, see *post* §112. See also *ante*, §58.

Plats and surveys, see §§458-460. The owner of a tract of land filed a map of it with the town clerk, showing a street, and a number of sales were made, some on the street, and the deeds were recorded. Then the owner sold to an innocent purchaser for value; but he was charged with notice as the plan was recorded and he had no right to block the street as plotted by building a house on it, *Streete v. Leete*, (Conn. 1906) 65 Atl. 373. An owner who files a map with the county clerk showing his land divided into lots and streets, as against purchasers of lots may subdivide lots still unsold as he desires and devote them to public uses, either as streets, parks, or in such other modes of a general nature calculated to give additional value to the rest of the land. He may not, however, alter the location and narrow the width of streets shown on the original map, *Herold v. Columbia Inv. & R. E. Co.*, (N. J. 1907) 67 Atl. 607. When the owner of a proposed "addition" to a city makes a survey and files with the city clerk a plat showing its division into squares and lots and streets, and sells lots described as bounded on such streets, he cannot claim ownership in a portion of the streets, *Flournoy v. Breard*, 116 La. 224, 40 S. 684. Although a court of law finds that the inhabitants and purchasers of a lot in a town site, sold in reference to a plan on which certain streets were shown, "have an interest in keeping open and maintaining the streets * * * for their joint and several and mutual common convenience and benefit," such a finding did not authorize the court to order obstructions on the streets removed when it was not shown that it would be of any special injury to the plaintiffs, *Thorpe v. Clinton*, (Ariz. 1906) 85 Pac. 1061. B. & C. Comp. s. 2738, provides that a dedication

of land duly noted on the plat of the town, shall be considered as a general warranty to the town, and when a certain plat by which lots have been sold gives a certain street, the donor cannot afterwards claim he never intended to dedicate the street and ten years adverse occupation is not sufficient to validate the plaintiff's title against the town, *Christian v. City of Eugene*, (Ore. 1907) 89 Pac. 419. The conditions on which maps of land to be dedicated for public ways shall be recorded are prescribed by Ky. Laws 1906, Ch. 58.

An owner of land who sold lots in accordance with a plat which showed lots abutting upon a street running parallel to a lake with no space between, thereby dedicated to the public use all the land between the front tier of lots and the bank of the lake. A purchaser of a lot from the original owner is entitled to an injunction against the erection by another purchaser of a building on the edge of the bank of the lake, *Davies v. Eppenstein*, 77 Ark. 221, 92 S. W. 19. Where a deed referred to a plat and expressly provided that such portion of the ground is sold "as is not dedicated for streets and alleys by the plat of land" it was held that "when a street has been dedicated in this way the city may accept it when it gets ready, and, in the meantime, the owners of the lots calling for the streets are estopped not only as against the other owners, but as against the city, to say that the ground is not a street, *Covington v. Hall*, (Ky. 1906) 98 S. W. 317.

A municipality by accepting part of the street shown on a statutory plat does not accept the whole street, nor by accepting a whole street accept other streets, and by 50 years' acquiescence in the occupation of a street by the owner of the tract embraced in the plat for business improvements, built at large expense, is estopped to demand the opening of the street, *Reichert Milling Co. v. Village of Freeburg*, 217 Ill. 384, 75 N. E. 544. Where a city has laid out a street to the width of fifty feet and has marked an additional ten feet to the width on the city plan, but the actual widening did not take place for a number of years, the grantees of the owners of the land who held the whole tract when the street was widened on the city plan were entitled to damages from the city when the street was broadened, *Fitzell v. City of Philadelphia*, 211 Pa. 1, 60 Atl. 323.

Dedication lacking. Although a plat is produced in evidence showing a square dedicated as a park, that is not suffi-

cient evidence of the dedication when there is nothing to prove that the deeds to certain lots refer to this plat or that this was the plat by which the grantors sold certain lots to which the deeds made reference, *Canton Co. v. Mayor, etc. of Baltimore*, (Md. 1907) 66 Atl. 679. A plat of a town addition certified to by the deputy county surveyor and the owner's agent, merely, did not comply with the Illinois Statutes and was invalid as a statutory dedication of the streets shown thereon. The title to the streets, therefore, remained in the original owner until he sold lots with reference to the plat, and then the grantees took the fee to the street, *Wilder v. Aurora, De K. & R. Electric Traction Co.*, 216 Ill. 493, 75 N. E. 194. A plat of Illinois land acknowledged before an Illinois Commissioner of deeds in New York was not a good statutory plat and did not convey to the city the title to the streets, alleys, and other public grounds shown upon the plat. Leaving a blank space on the plat without designating it as any of the above, does not show a common law dedication in the absence of evidence of an intention by the grantor to make such dedication and an acceptance thereof by the public. A conveyance by the grantor before acceptance by the public operates as a withdrawal of the offer of dedication, *Birge v. City of Centralia*, 218 Ill. 503, 75 N. E. 1035. When a plat of a road is filed in the county records which puts a road one mile west of the defendant's premises, and the surveyor's notes make it one mile east of his premises, no notice is given the defendant of a road through his property and he will not be enjoined from putting up a fence across his prairie land if there is no proof of twenty years adverse use of a road across his land, *Lieber v. People*, 33 Colo. 493, 81 Pac. 270.

Sec. 6a. Acceptance.

Acceptance of highway, see *ante* §59.

The rule that the acceptance of a street by a city need not at common law be evidenced by any formal act upon the part of the municipal authorities but may be implied when the municipality takes control of it, was affirmed, and the evidence held to make out such a case of public acceptance, *Paducah v. Johnston*, (Ky. 1906) 93 S. W. 1035. In order to establish acceptance of a way the jury must be satisfied not only that the general public use it and travel upon it as a thoroughfare, but also that the implied dedication has been

accepted by the public authorities and the way taken in charge and maintained as other highways, *Chapman v. City of Sault Ste. Marie*, 146 Mich. 23, 109 N. W. 53. When a town had built a sewer in a street that had been dedicated to the public use, and when the town had granted a city the right to lay water mains through the street it was sufficient to show the acceptance of the street by the city although no formal order was passed accepting the street in accordance with the provisions of a town ordinance, *Arnold v. City of Orange*, (N. J. Ch. 1907) 66 Atl. 1052. The action of the owner of a tract who had dedicated streets and alleys to the public according to a recorded plat, in selling it and allowing it to be traveled over and cultivated without reference to the dedicated streets and alleys for 30 years before acceptance by a subsequently organized municipality, amounted to a withdrawal of such dedication. The inclusion of the territory within the municipality, the taking of sand therefrom by its officials without regard to such street and lot lines, a survey by it made many years later, and the later erection of a pesthouse thereon with the consent of the owner, did not constitute an acceptance of the dedication, *City of Venice v. Madison County Ferry Co.*, 216 Ill. 345, 75 N. E. 105. Kirby's Arkansas Digest, Section 5531, which provides that no street dedicated to public use by the proprietor in a city shall be deemed public unless accepted by an ordinance of the city council, construed, *Brewer v. Pine Bluff*, 80 Ark. 489, 97 S. W. 1034. Under Code 1873, Sec. 527, 561 and 563, it is sufficient acceptance of platted streets for the town to establish a system of sewers in them 15 years after the recording of the plat, *Burroughs v. City of Cherokee*, (Ia. 1906) 109 N. W. 876.

Sec. 63. Revocation or abandonment.

Vacation of streets, see *post* §220.

For other cases of withdrawal of dedication, see *ante* §§61, 62.

Failure for thirty years to observe the lines of a street as platted amounted to a withdrawal of dedication in *Venice v. Madison County Ferry Co.*, 216 Ill. 345, 75 N. E. 105. A dedication of lands to the public for street purposes, in the absence of clear contrary intent, does not divest the owner of the title to the land, but only subjects the land and the title to the public easement for street purposes; and, if the

easement be lawfully surrendered and relinquished, the title to the land remains in the dedicator or his successors in title, discharged of the easement, *Robbins v. White*, (Fla. 1907) 42 S. 841.

When a city opens up streets, accepting their dedication to the public use, and then abandons them completely for 40 years, it loses all its rights in them, *Kelsoe v. Oglethorpe*, 120 Ga. 951, 48 S. E. 366. Under a resolution authorizing the town officers to remove obstructions from streets the town has no right to tear down the fences and lay out a street which was dedicated to the use of the public by a plan, but never laid out, and used for forty years, since the dedication by private parties, *Robins v. McGehee*, 127 Ga. 431, 56 S. E. 461. For 13 years plaintiff's improvements remained on land which had been dedicated to the use of the public as a street, and the city was then estopped to deny the plaintiff's title, *Oliver v. Synhorst*, 48 Ore. 292, 86 Pac. 376. Where a city has allowed persons to occupy premises for more than 60 years, and build thereon buildings and docks upon which taxes have been paid, it is estopped to claim title thereto by dedication as a public street, *Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N. E. 296. The owner of land dedicated a square as a public park, referring to the dedicated part in a mortgage of his other premises, but he obtained a valid title to it when he occupied it for thirty years after the date of the mortgage, *Canton Co. v. Mayor, etc. of Baltimore*, (Md. 1907) 64 Atl. 679.

Where not a lot has been sold in a "paper city" which has been laid out elaborately into lots and streets, according to a plat, not a single street thrown open to public use, and for more than 20 years no effort has been made by the owners or any one else to bring the land within the limits of an incorporated town; but on the contrary, the land has been continuously fenced and cultivated as a farm, the conclusion is irresistible that the whole scheme has failed and been abandoned. The dedication therefore is no longer in force, *Dickinson v. Arkansas City Co.*, 77 Ark. 570, 92 S. W. 21.

Land was conveyed by a city to a railroad company for depot and general purposes. Held, An occasional use for the landing of boats with the consent of the company could not be construed as a dedication to an inconsistent public use, *Sioux City v. Chicago & N. W. Ry. Co.*, 129 Ia. 694, 106 N. W. 183.

DEEDS

See further, COVENANTS.

Use of deeds in evidence, see *post* §154.

Extrinsic evidence as to, see *post* §155.

Construed as mortgages, see *post* §§370, 371.

Proof of lost deeds, see *post* §156.

Construction of mining deeds and leases, see *post* §357.

See PLATS AND SURVEYS.

Recording of, see RECORDS AND RECORDING.

Reformation of, see REFORMATION.

Sec. 64. What constitute. An instrument containing a granting clause with the statutory words "warrant and convey," a reservation of a life estate as a homestead, a provision that the grantee shall live with and care for the grantor and his wife during old age, and another that the "title and interest in said land shall vest absolute in said grantee" at the death of the grantor "but not before," was a deed, *Venters v. Wickens*, 224 Ill. 569, 79 N. E. 946.

Sec. 65. Mental capacity of grantor. If the grantor is mentally incapable of performing the act, then she is not bound by the deed, no matter what produced her mental incapacity, *Cason v. Cason*, 116 Tenn. 173, 93 S. W. 89. Where the grantor is very weak and feeble, she may still be able to convey property by deed, and even though she does not understand the legal verbiage and technical terms of the deed it is valid if her mental capacity is sufficient to enable her to understand that the deed conveyed certain property to a charitable organization, *Moorhead v. Scovel*, 210 Pa. 446, 60 Atl. 13.

In an action to vacate and avoid a deed made by an ancestor of the plaintiff, mental incapacity on the part of the grantor was urged. The charge "that it requires more mental capacity to execute a deed than a will" cannot be affirmed as a proposition of law, *Bond v. Branning Mfg. Co.*, 140 N. C. 381, 52 S. E. 929. "To render the deed invalid, they must be satisfied that the grantor was not in a situation to transact that particular business rationally—not, on the one hand, that he should be capable of doing all kinds of business with judgment and discretion, nor, on the other that he should

be wholly deprived of reason, so as to be incapable of doing the most familiar and trifling work, that, if the mind and memory were in such a situation at the time of executing the deed as to render him wholly incompetent to judge of his rights and interest in relation to that transaction, the deed would be void," *Nelson v. Thompson*, (N. D. 1907) 112 N. W. 1058.

The legal presumption of mental capacity in a grantor is not to be overcome by infirmity of mind or body, but it must be shown the grantor did not have sufficient mental capacity to transact business, and the grant of his whole estate to his wife and one daughter with whom he resided are not sufficient to show lack of mental capacity although all his other heirs are excluded, *Teter v. Teter*, 59 W. Va. 449, 53 S. E. 779.

The grantor was found incapable in *Hurley v. Kennally*, (Mo. 1907) 103 S. W. 937, and not in *Chadwell v. Reed*, 198 Mo. 359, 95 S. W. 227. *Saffer v. Mast*, 223 Ill. 108, 79 N. E. 32.

Sec. 66. Deeds distinguished from wills, contracts and other instruments.

Deeds to take effect on grantor's death, see further, *ante* §64, *post* §76.

Deeds and not wills. In a dispute as to whether a certain instrument purporting to convey land was a deed or testamentary in character the evidence was examined and it was held that the instrument was "what the parties intended that it should be, a grant in fee with a power of revocation alone reserved," *Stamper v. Venable*, (Tenn. 1906) 97 S. W. 812. A deed to the grantor's wife and son "their heirs and assigns forever that is at the time of the death" of the grantor, the wife to have and hold for and during her natural life the property and at her death the son to have and to hold to him, his heirs and assigns forever was valid because it conveyed a present interest, *Ecklar v. Robinson*, (Ky. 1906) 96 S. W. 845. When a husband through a third person conveyed to his wife an estate in land "commencing upon the death of the husband" and continuing so long as "the wife" shall live, the conveyance was not testamentary in its character but was operative in conveying a present interest. The fact that the enjoyment of the estate created was postponed is immaterial,

O'Day v. Meadows, 94 Mo. 588, 92 S. W. 637. Where a mother gives a deed of real estate to her child and the instrument is duly recorded, it is valid as a deed and it is not a will, although it provides that it reserves "a lifetime lease to the land, in three days after the said party of the first part is deceased this deed shall be in full force." This was merely a deed reserving a life estate to the grantor, Pentico v. Hays, 75 Kan. 76, 88 Pac. 738. An instrument reading as follows, "I hereby grant, bargain, sell, convey and warrant to Mrs. 'G.' during her lifetime the following described property (describing the land) and at the end of her life I will this property to Mrs. 'B.' all of her lifetime, and after her * * * lifetime said described property goes to her children and their heirs and assigns forever," having been executed as a deed was valid as such, Brinson v. Sandifer, (Miss 1906) 42 S. 89. If a paper is duly attested and delivered as a deed, with a granting and habendum clause conveying title, it cannot be construed as being testamentary in its character, when it recites that the premises are to remain the "right and property" of the grantor "during her natural life," as this merely reserves a life estate, Sharpe v. Mathews, 123 Ga. 794, 51 S. E. 706.

A person's intention that deeds executed by him should take effect as testamentary instruments cannot control the plain terms of the deeds conveying a present interest, Dodson v. Dodson, 142 Mich. 586, 105 N. W. 1110. Where the grantor in an instrument purporting upon its face to be a deed told the draftsman that he wished to make a will but later signed it and then, without any reservation, delivered it to a third person to hold until the grantor's death and then deliver it to the grantee, the instrument was a deed and, being properly delivered, passed the title, Griswold v. Griswold, (Ala. 1906) 42 S. 554. See *ante* §64.

Will. Instrument in form a deed but testamentary in character, Gump v. Gowans, 226 Ill. 635, 80 N. E. 1086. A grant made by an old man in consideration of love and affection and \$10 who died six months later which provided that "if I * * * outlive * * * A. J. (his wife), the land reverts back to me in fee. That if I should die first then the said A. J. shall have this land for her lifetime for her use and support, and at her death go in fee to C—d, my son," was construed as a testamentary disposition and not being executed as a will was void, Aldridge v. Aldridge, (Mo. 1907) 101 S. W. 42.

Where an intestate delivered a deed to her son and later handed him written instruments instructing him to sell the land upon her death and distribute the proceeds among certain persons, and during her life she continued to receive the net income of the land, the son managing it and not claiming any title, the conveyance was void as a will and the land descended as in the case of an intestacy. Although the instrument was in form a deed the parties did not in fact intend that it should pass the title, *Oswald v. Caldwell*, 225 Ill. 224, 80 N. E. 131.

Power of attorney. An instrument reciting that the owner of mining claims "sells" his claims "upon the terms and consideration following to wit," followed by authority to "sell and negotiate" the mines for any sum above \$45,000, and to retain out of this purchase price seven-eighths of the excess above that figure and by an agreement to execute any deed that may be necessary to convey a good title amounts to a grant of authority only and not a transfer of title, *Taylor v. Burns*, 203 U. S. 120.

Release. Where a grantor of a deed of trust conveyed to the plaintiff by warranty deed and at the end thereof the beneficiary in the deed of trust signed and acknowledged the following, "I hereby release the above mentioned land from a deed of trust held by me * * * and transfer all my claim to the same" to the plaintiff such writing was a mere release, not a quit claim deed, and did not pass the title thereto, *Stevens Lumber Co. v. Hughes*, (Miss. 1905) 38 S. 769.

Contract. An instrument signed and acknowledged by both parties which recited that one in consideration of a certain sum paid and to be paid had granted and conveyed "with deed in fee" to the other lands "to have and hold" on condition that the other make a certain payment within a specified time, that a lien was retained and upon payment the wife of the grantor should join in a deed, was a contract to convey, not a deed, *Powell v. Hunter*, 204 Mo. 393, 102 S. W. 1020.

Sec. 67. Execution. Sec. 5343 and 5345 of B. & C's Codes regulating the execution of deeds in other states and in foreign countries are amended by Ore. Laws 1907, Ch. 169. Two witnesses are required for deeds by Wis. Laws 1907, Ch. 568. A lawyer may testify that from his knowledge of

her handwriting he believes a certain woman actually signed a certain deed although he gained the knowledge from privileged communications from her, *Dukes v. Davis*, 30 Ky. Law Rep. 1348, 101 S. W. 390. It was held that certain interlinations in the descriptive part of a deed raised such a suspicion as would authorize its exclusion from evidence. A deed 30 years old is admissible without proof of execution and when no other objection is made will be presumed to have come from proper custody. To disprove the genuineness of the signature of the grantor other signatures made by him are not admissible for comparison, *Campbell v. Bates*, 143 Ala. 338, 39 S. 144.

Sec. 68. Parties—Names—Deed to territory. The signing of a deed by one not mentioned or described in the body thereof as grantor does not at law convey his interest in the lands described, *Jason v. Johnson*, (N. J. 1907) 67 Atl. 42. In an action to determine adverse claims to a parcel of land it appeared that a mortgage in which Ole S. Ackerland was named as mortgagor, bore a notarial certificate reciting that the notary knows Ole S. Ackenland, who appeared before him, to be the person who executed the mortgage. The record title was in Ole Ackenland, but evidence showed that Ole Ackerland was the man who entered the land under the land laws, and was in possession when the mortgage was given. Held that Ackerland and Ackenland were the same person, *State Finance Co. v. Halstenson*, (N. D. 1908) 114 N. W. 724. "Where father and son have the same name as the grantee in a conveyance of land and neither is otherwise designated as the grantee, the father will be presumed to be the grantee if other things are equal and there is no evidence to the contrary," *Hess v. Stockard*, 99 Minn. 504, 109 N. W. 1113.

Assumed name. Although a father bought real estate in the name of his son with his own money, representing himself as having his son's name, a subsequent sale under the assumed name passed a valid title, *Chapman v. Tyson*, 39 Wash. 523, 81 Pac. 1066.

Although a deed to a Territory contained no clause granting a property to the "heirs" or "successors" of the territory, a transmissible title was granted and the property did not re-

vert to the grantor when the territory was changed into a State, *Sylvester v. State*, (Wash. 1907) 9 Pac. 15.

Sec. 69. Form of deeds under recent statutes.

See further, execution of deeds, *ante* §67.

Missouri Revised Statutes 1899, Section 900, as to conveyances by deed construed together with section 4596, providing that an estate of freehold or of inheritance may be made to commence in future, *O'Day v. Meadows*, 194 Mo. 588, 92 S. W. 637. Certified copies of releases may be recorded as deeds, N. J. Laws 1907, Ch. 185. The form of proof and certificate of deeds executed by corporations is prescribed by N. C. Laws 1907, Ch. 927. The form of deeds reserving life estates is prescribed by Wis. Laws 1907, Ch. 246.

Sec. 70. Curative statutes. Statutes curing defects in acknowledgments, see *ante* §3.

Deeds defective as to seals, attestation and acknowledgment and other formalities are validated by Conn. Acts 1907, Ch. 263, Sec. 4. Sales of real estate by attorneys in fact, prior to 1875 are ratified by N. Y. Laws 1907, Ch. 518. All defective deeds are cured by Ore. Laws 1907, Ch. 174. Instruments informally executed and recorded prior to Jan. 1, 1907, are validated by Utah Laws 1907, Ch. 90.

Sec. 71. Confirmatory deeds. Confirmatory deeds may be given by public officials when originals are lost, N. J. Laws 1906, Ch. 279. A plaintiff in a suit for the recovery of land made a quit claim deed to H. which contained only a partial description of the land, and referred to an earlier deed made by R., at that time owner, said deed being made in order to perfect the title to the land. The description in the R. deed must be considered as if it had been inserted in the later deed which should then be construed with that description in it, *Gudger v. White*, 141 N. C. 507, 54 S. E. 386.

Sec. 72. Quitclaim deeds. Under Comp. Laws, Sec. 8959, grantees under quitclaim deeds, without covenants of warranty, take only such titles as their grantors have, *Zeigler v. Valley Coal Co.*, (Mich. 1907) 113 N. W. 775. A quitclaim deed which conveys only the right, title and interest of the grantor in the property limits the estate to such right

and interest as the grantor may have, and if the grantor is a tenant in common the deed is not color of title for anything more than his interest. But a quitclaim deed of all interest in a certain tract has a broader signification and constitutes color of title, *Waterman Hall v. Waterman*, 220 Ill. 569, 77 N. E. 142.

Sec. 73. Delivery—In general—Estoppel. The production of a deed by the grantee is prima facie evidence of its delivery, *Morton v. Morton*, (Ark. 1907) 102 S. W. 213. Where dates of execution and acknowledgment are different delivery will be presumed on latter, *Crabtree v. Crabtree*, (Ia. 1907) 113 N. W. 923.

Estoppel. A grantor who executed and delivered a deed to enable the grantee to execute a mortgage which was afterwards made cannot rely upon the fact that it was never delivered even as against the grantee, *Creeden v. Mahoney*, 193 Mass. 402, 79 N. E. 776. When the grantor in a conveyance to his son for life with remainder to his grandson left the deed with the county clerk with instructions not to record it because he might want to take it back, but the son took possession and later sold his interest to another grandson who before buying was told by his grandfather upon inquiry that the deed was all right, the grandfather was estopped by his conduct as to the buyer of the life estate from denying delivery, *Akers v. Shoemaker* (Ky. 1907) 102 S. W. 842.

Sec. 74. Delivery—What constitutes—Effect of agreement—Husband and wife—Deposit in receptacle—Delivery without authority—Return for correction.

Delivery found. Facts held to show delivery, *Gilman v. Gilman*, 143 Mich. 287, 106 N. W. 859. Evidence examined and held to show that a deed was in fact delivered, *Calkins v. Calkins*, 220 Ill. 111, 77 N. E. 102. Where a grantor handed the deed to one of his two daughters who were the grantees and told her to deliver it to the proper parties at his death, the deed was delivered and the title passed, *Strickland v. Griswold*, (Ala. 1907). 43 S. 105. Where the grantor handed the deed to the grantee's son with instructions that if the grantee decided to take the land he was to pay the purchase money "soon" there was a sufficient delivery although the grantee did not send his check in payment for several months, *Smith v. Stephens*, 82 Ark. 47, 100 S. W. 78.

Effect of agreement. Where a husband and wife executed a deed conveying her land but agreed that there should be no actual delivery to the grantee until after the wife's death the deed having been actually delivered and recorded during her life time and there being no evidence that the grantee knew of such agreement between the grantors, the title passed. As the only reason for the conveyance was to avoid the payment of inheritance taxes equity would not aid the husband to have it set aside, *Blake v. Ogden*, 223 Ill. 204, 79 N. E. 68.

Delivery without authority. If a deed was signed by the grantor and delivered to an attorney with the understanding that it should be under the control of the grantor, the delivery was not sufficient to pass title, and when the grantor subsequently revoked the deed the grantee had no further right to the property, *Hayden v. Collins*, 1 Col. App. 259, 81 Pac. 1120. When two deeds were written by a scrivener before whom they were acknowledged and given to him by the grantor to keep for him, and several months later the scrivener concluded to give them back to the grantor and handed them to the grantee to give to the grantor, there was no delivery. They were held by the scrivener simply at the pleasure of the grantor, and subject to his authority, and the delivery of the deeds by the scrivener to the grantee without the knowledge or consent of the grantor, was not in contemplation of law a delivery and legally they continued to remain in the hands of the scrivener until delivered by him to the grantor, or some other person by the grantor's direction, *Koger v. Koger*, (Ky. 1906) 92 S. W. 961.

Deposit in receptacle. The owner of land executed deeds during his last sickness and directed his nurse to put them in a box in his secretary. Shortly before his death he asked the grantee to take care of the box. Held, No delivery of the deeds, *Gleason v. Stonehouse*, (Mich. 1907) 113 N. W. 315. When the grantor in a deed to his wife without her knowledge put it in a tin box among his private papers in a wardrobe used by himself and his wife where it was found after his death, there was no delivery, *Ligon v. Barton*, 88 Miss. 135, 40 S. 555. Where a father had a deed of his homestead made to the son, with the understanding that he assume the support of his father, and the deed was deposited in a chest from which the son was requested by the father

to take it and have it recorded, but the son refused to accept the deed, the deed never took effect, and a second deed by the same vendor to another party conveyed the title, *Reel v. Reel*, 59 W. Va. 106, 52 S. E. 1023.

Husband and wife. A mortgage executed and delivered to a husband, given for the benefit of the wife, is thereby delivered to the wife, *Rhea v. Ins. Co.*, 77 Ark. 57, 90 S. W. 850. Delivery to husband of deed to wife is not delivery to wife in the absence of any authority from her to livery to wife in the absence of any authority from her to receive it for her, *Richards v. Moran*, (Iowa 1908) 114 N. W. 1035. Where a wife executed certain deeds to convey the land to her husband if he survived her, but there was no intention that they should operate as present conveyances, and just before her death she solemnly declared that she owned the land, there was no delivery sufficient to pass the title. But where the grantor in another deed carried it to the grantor's husband, told him to give it to his wife and mark thereon the date of delivery, and this having been done, the grantee's husband put it in his private papers, the deed was validly delivered, *Russell v. Mitchell*, 223 Ill. 438, 79 N. E. 141. Evidence held to show that a deed executed by a husband and conveying property to his wife was not intended by him to be delivered to her, *Connor v. Rivard*, 144 Mich. 177, 107 N. W. 897.

Return for correction. After delivery of a deed to the grantee it was returned to the grantor for correction. A new deed was then executed by the grantor and given to the register who recorded it and returned it to the grantor. Held, Sufficient delivery, *Whiting v. Hogland*, 127 Wis. 135, 106 N. W. 391. Where a deed when delivered to the grantee was void because of its failure to properly describe the premises intended to be conveyed, and later, after the description was corrected, was never delivered, it passed no title, *Williams v. Husky*, 192 Mo. 533, 90 S. W. 425. An obligor in a bond for a title made out a deed to the obligee upon payment of the purchase money to him by the agent of the obligee and delivered it. This was a prima facie case of delivery of the deed; but this inference may be rebutted on proof that the obligee wanted the deed made out to a third party and had so instructed his agent, and that he returned the deed to the obligator for correction, *Scarborough v. Holder*, 127 Ga. 256,

56 S. E. 293. A mistake was made in a deed conveying real estate from A. to B., and in order to rectify it deeds were drawn up conveying back to A. and the corrected deeds from A. to B. were also prepared, B. signed the deed back to A. and presented the deed for A. to sign conveying the correct amount of real estate, but A. made an excuse that she wanted to show the deed to her husband in the same building and took it and had it recorded without signing the corrected deed to B. A conveyance by her to an innocent purchaser did not pass title as there was no delivery of the deed to her by B. and no intention of making any such delivery, *Burns v. Kennedy*, (Ore. 1907) 90 Pac. 1102.

Sec. 75. Delivery by recording. Where the plaintiff, being engaged to be married to the defendant and having in his hands a considerable amount of money belonging to her, executed a deed to her of land which he owned, and after causing it to be recorded took it to his own office and retained possession of it, he accepted delivery of the deed as agent of the grantee, *Blackwell v. Blackwell*, 196 Mass. 186, 81 N. E. 910.

The presumption that a deed executed and recorded was sufficiently delivered can be overcome only upon a "clear and satisfactory" showing, *Davis v. Hall*, 128 Ia. 647, 105 N. W. 122. The presumption that a voluntary deed was delivered because recorded is not overcome merely by evidence that the grantor retained possession both of the deed, and the property thereby conveyed, *Creighton v. Roe*, 218 Ill. 619, 75 N. E. 1073. While acceptance by the grantee is as essential as a delivery by the grantor to make a deed conveying real estate effectual, when the deed appears to be beneficial to the grantee, and the grantor has caused it to be recorded, the presumption is that it has been delivered, and that it was accepted by the grantee, *Collings v. Collings*, (Ky. 1906) 92 S. W. 577. When the grantor and grantee were husband and wife and the grantor had the deeds recorded but ordered them delivered back to him this order was not inconsistent with a legal delivery. Although the wife never learned of the conveyances until after her husband's death she is presumed to have accepted them, *Russell v. May*, 77 Ark. 89, 90 S. W. 617.

Evidence. The evidence was examined and held to show no delivery of a deed although it was recorded in *McCune v.*

Goodwillie, 204 Mo. 306, 102 S. W. 997. Registration is not conclusive evidence of delivery of a deed and the declarations of a grantor made when he signed and acknowledged it and explanatory of his later act in having it recorded are competent on the question of delivery, *Napier v. Elliott*, 146 Ala. 213, 40 S. 752. Where a man executed, acknowledged and recorded a deed to his adult niece who lived in another state, but remained in possession until he conveyed to his son who at once went into possession, as the niece did not know of the deed there was not sufficient evidence of delivery, *Abrams v. Beale*, 224 Ill. 496, 79 N. E. 671. Upon the evidence it was held that a certain deed although recorded was never delivered and the grantor never intended that the grantee, his son, should have any interest in the land until the grantor's death because the premises constituted the grantor's entire property. It was therefore ordered cancelled, *Konser v. Konser*, 219 Ill. 466, 76 N. E. 846.

Estoppel. A grantor who knew his deed was on record and took no action to have it annulled is not estopped to deny that it was ever delivered as against others than bona fide purchasers of the land it purported to convey, *Gulf C. & C. Co. v. Alabama C. & C. Co.*, 145 Ala. 228, 40 S. 397.

Sec. 76. Escrow—In general—Delivery to take place on grantor's death. Where the grantor placed the deed with a bank in escrow to be delivered upon payment of the grantee's notes the transaction was not an option but a sale, *Bonanza Mining & Smelting Co. v. Ware*, 78 Ark. 306, 95 S. W. 765. When B. purchasing a piece of property from A. knows of the delivery of a deed to C. in escrow, he might be compelled to deliver the property to C., and a bill of specific performance would be sustained, *Wilkins v. Somerville* (Vt. 1907) 66 Atl. 893. A. agreed to convey to B. half of a tract of eighty acres of land in consideration of a conveyance by B. of 40 acres of B.'s land, and when A. had deposited a deed in escrow under this agreement, B. was entitled to it on presentation of a deed to his 40 acres although A. had died, *Guild v. Althouse*, 71 Kan. 604, 81 Pac. 172. A deed was delivered by a father to his son in escrow to be delivered on the completion of a driveway through his land alongside of the car tracks. The grantee proposed a new route which the father refused to accept, and then the grantee went to the son and

took the deed to be recorded without the son's knowledge, but the deed was not binding on the grantor, *Virginia P. & P. Co. v. Patterson*, 104 Va. 189, 51 S. E. 157. A. being owner of an undivided half interest in land, signed a contract to convey the whole to B., who also signed. A. agreed to get the signature of the other owner and the contract was left with A.'s attorney to be delivered by him on the payment of \$80. This he refused to do. Held, The contract operated as an escrow, was binding upon A. who was liable in damages to B., *Naylor v. Stene*, 96 Minn. 57, 104 N. W. 685. When A. had deposited a deed in escrow and a statement of the terms of the escrow, deposited with the bank, omitted any charge of interest on the purchase price, to be paid by B., the purchaser. C. purchasing from B. subsequently without notice of the agreement to pay interest was not compelled to pay the interest, *Womble v. Wilbur*, 3 Cal. App. 535, 86 Pac. 916.

Parol evidence. When the parties have neglected to set forth in a deed in escrow the condition on which it should be delivered parol evidence is admissible, and equity may compel the return of escrow paper to the grantor on the failure of the conditions of the agreement, *Beach v. Bellwood*, 104 Va. 170, 51 S. E. 184.

Delivery to take place on grantor's death. A delivery of a deed to a third person to take effect on the grantor's death in consideration of care for life vests the title in the grantee subject to enjoyment by the grantor for life, and the delivery was held valid, *Nolan v. Otney*, 75 Kan. 311, 89 Pac. 690. A deed from father to son was executed, placed in an envelope on which was written "in escrow" and delivered to a third person beyond the father's control. Annexed to the deed was a statement that it should be delivered after grantor's death, Held, Title vested in delivery to the third person, *Wells v. Wells*, (Wis. 1907) 111 N. W. 1111. A deed was executed by the plaintiff's mother and delivered to A. to hold in escrow until her death, when the deed should be delivered to the plaintiff. The estate vested in the plaintiff immediately on the delivery of the deed, subject to a life estate for the mother who had no right to demand that the deed be returned, and a subsequent deed to B. with notice of the deed to the plaintiff and not for a valuable consideration, was void, *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337. Evidence was held sufficient to establish a valid delivery of a deed of land to the

grantor's daughter, in which the grantor reserved a life interest in himself, which showed a declaration by the grantor of his purpose to deposit it with a designated third person to be given to his daughter on his death, and that he did deposit it with such person, who on the grantor's death gave it to the grantee, notwithstanding the fact that no further showing was made as to what instructions were given to the depository, *Young v. McWilliams*, 75 Kan. 243, 89 Pac. 12.

A warranty deed recited that it was to be placed in escrow and delivered after grantor's death, on payment by the grantee. Held, No present interest passed, *Wilson v. Carter*, 132 Ia. 442, 109 N. W. 886. A warranty deed with the clause "This deed is not to be operative until after the death of the parties of the first part thereto" creates no present interest and is revocable by the grantors, *Leonard v. Leonard*, 145 Mich. 563, 108 N. W. 985. Where A. placed a deed in escrow to B. with C., leaving instructions that it should be delivered to B. on his death, the delivery was not valid when A. retained by agreement the right to have the deed returned to him on payment of the money advanced by B., and the deed was inoperative to pass title, *Keyes v. Meyers*, 147 Cal. 702, 82 Pac. 304. Where deeds were delivered to the grantor's son to take to his office and put them in his desk there to await the termination of his illness, with instructions to record them in case he died, but to destroy them if he recovered, there was no delivery. Upon the evidence, however, it appeared that the grantor later ratified them so as to vest a good title in the grantee, *Phelps v. Pratt*, 225 Ill. 85, 80 N. E. 69. A deed by a wife for the purpose of conveying certain land to her husband in case he survived her, which was handed to him by her and put in his private box where it remained until his death, was not delivered to him. The deed was not intended to take effect at once and pass title to him but only in case of his survival and if she survived was to be destroyed, *Elliott v. Murray*, 225 Ill. 107, 80 N. E. 77. Where a grantor acknowledged a deed, put it in an envelope and delivered it to a custodian to be turned over to the grantee upon the grantor's death unless recalled by the latter there was no delivery. A clause in the grantor's will executed subsequently which referred to the property described in the deed as having been previously conveyed does not establish the delivery or have the effect of a devise, *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151. When the

grantor gave a deed to be delivered on his death, handing it to the agent of the grantee and saying, "You hold that until the wind leaves me," the delivery was not valid and the deed may be set aside. There was here no intention shown by the grantor to part with the deed, thereby putting title in the grantee, until after his death, and the deed was not in the form required for a testamentary devise, *Schlicher v. Keeler*, 67 N. J. Eq. 635, 61 Atl. 434. Pursuant to a mutual purpose of an aged couple to secure to the survivor the property of the other, the wife executed a deed of her land to the husband, expressed to take effect after her death, and at the same time the husband made a will, disposing of the deeded land to his wife for life with interests over. Both instruments were placed in one envelope and left with a third party. The husband died first. The court found on these facts that there was no intention by either spouse to part presently with his or her property, but that the deed was testamentary in nature and therefore revocable, (citing authorities,) *Sappingfield v. King et al*, (Ore. 1907) 89 Pac. 142.

Sec. 77. Acceptance.

Acceptance of beneficial grant presumed by recording, see *ante* §75.

Although a deed contains a mistake which makes the purchaser a co-tenant with his children, yet twenty years acquiescence and possession under the terms of the deed raise the presumption of validity and render it unchangeable, *Corbett v. Fogle*, 72 S. C. 312, 51 S. E. 884. Where a deed to a city was brought to the office of its street commissioners and thereupon the secretary of the board put it in the pigeon hole in which such papers that had not been acted on or accepted were kept there was no evidence of delivery to the grantee, *Whitcomb v. Boston*, 192 Mass. 211, 78 N. E. 407.

Sec. 78. Consideration.

Adequacy. The consideration was found adequate in *Saffer v. Mast*, 223 Ill. 108, 79 N. E. 32. A deed by a father to a son upon the consideration of love and affection is valid, *Rittenhouse v. Swango*, (Ky. 1906) 97 S. W. 743. Where an owner lived with his son and conveyed the land to him in return for nursing mainly done by the son's wife, there was a valuable consideration and equity would reform the deed

in case of a mistake, *Finch v. Green*, 225 Ill. 304, 80 N. E. 318. When a deed to real estate is given by a mother to her son in consideration of support for the balance of her life, and no fraud or undue influence is shown, it is for a valuable consideration and is valid, *Kleckner v. Kleckner*, 212 Pa. 515, 61 Atl. 1019. If the devisees of a will who receive property conditional on the death without heirs of another devisee, convey to him their interest under the will for a valuable consideration, such conveyance is binding, *Cheek v. Walker*, 138 N. C. 446, 50 S. E. 863. A quitclaim deed in consideration of love and affection and \$5 paid is based upon a consideration sufficient to make the grantee a bona fide purchaser. Lack of consideration cannot be proved in such a case to defeat the operative words of the conveyance, *Strong v. Whybark*, 204 Mo. 341, 102 S. W. 968. If a lodge duly incorporated sells real estate, the deed cannot be set aside for inadequacy of consideration unless the inadequacy is so great as to shock the conscience and amount to proof of fraud, *Deepwater C. No. 40 O. U. A. M. v. Renick*, 59 W. Va. 343, 53 S. E. 552.

Where a testator devised to his wife for life with remainder to his daughter, and the only consideration for the latter's conveyance to her mother was funds acquired by the mother from the testator's estate, the conveyance was void as between the parties and the daughter could recover the land conveyed from her mother's heir, *Heintz v. Dennis*, 216 Ill. 487, 75 N. E. 192. A father may set aside a deed to his son of all his property, worth \$1200 for \$726, where the son was a sharp business man and took advantage of his father's domestic troubles and his desire to move to another state, *Bradley v. Bradley*, (Ky. 1906) 91 S. W. 1143.

Advances. Although the deeds given by the children to a parent in consideration of advances relinquishing all claim to his estate after death, are valid in Tennessee yet they are inoperative as applied to the real estate located in Virginia, *Mort. v. Jones*, 105 Va. 668, 51 S. E. 220. A father conveyed a piece of land to his son during minority in consideration of love and affection, but when the son disaffirmed a reconveyance to his father after coming of age, the title remained in him as the presumption is that a deed from a father to a son is intended as an advancement, *Seed v. Jennings*, 47 Ore. 464, 83 Pac. 872.

Evidence to contradict recital of consideration. The recital in a deed as to the consideration is only prima facie evidence and may be rebutted by parol proof, *Barton v. Eminence Building Assn.*, (Ky. 1906) 93 S. W. 9. The recital of \$5,000 consideration in a deed does not prevent proof that the real consideration was \$600 in money, assumption of a mortgage and an agreement to hold the property in trust, *Jost v. Wolf*, 130 Wis. 37, 110 N. W. 222. The recital in a deed of the payment of the consideration is only prima facie evidence. The chancellor's finding upon conflicting evidence as to what the consideration really was will not be disturbed upon appeal, *Morton v. Morton* (Ark. 1907) 102 S. W. 213. As between the parties themselves recitals in a deed as to payment of consideration may be shown to be in fact untrue, *Brackett's Admr. v. Boreing*, (Ky. 1905) 89 S. W. 496. In an action to have a deed cancelled the evidence was examined and held to show that the consideration recited therein was not in fact paid and the deed was therefore declared null, *Allison's Ex. v. Orndorff*, (Ky. 1906) 92 S. W. 287.

Entire consideration. When a deed of several pieces of land was based upon one and the same consideration, and was an entire and indivisible transaction, the contract of conveyance was entire, and being voidable in part was voidable as to all, *Reeder v. Meredith*, 78 Ark. 109, 93 S. W. 558.

Failure of consideration. A deed in consideration of the support of the grantors for life and the payment of a mortgage cannot be set aside because of the grantee's failure to pay the mortgage and death before the grantor where the grantee up to his death supported them, *Calkins v. Calkins*, 220 Ill. 111, 77 N. E. 102. When a wife induces a husband to deed property to her on the promise that she will return to his home again, the consideration for the deed fails when she refuses to live with him and he is entitled to have it cancelled, *Jennings v. Jennings*, 48 Ore. 69, 85 Pac. 65. When lots were deeded to a drug store company in consideration of the removal of the store to the lots and the consequent increase in value of the surrounding property, the owner has a right to have the deeds cancelled when the store is not moved as agreed, *Mosier v. Walter*, 17 Okl. 305, 87 Pac. 877. When it appeared that a son, the grantee in a deed from his parents, the consideration for which was the son's agreement to support them during the remainder of their life, had failed

to substantially perform his agreement, the deed was cancelled at the instance of the grantors, *Alvey v Alvey*, (Ky. 1906) 97 S. W. 1106. Where a mother delivered a deed to a daughter upon the express understanding that it was not to take effect unless the daughter signed a certain obligation it was held that the daughter should be granted "a reasonable time within which to sign the obligation* * * and, in the event she fails to do so, to adjudge a cancellation of the deed," *Dudley v. Herring*, (Ky. 1906) 89 S. W. 289.

Sec. 79. Certainty of description—Area—References to plats and other documents. When in an action of trespass the description of the land given in the deeds filed in the record were meager and unsatisfactory and it was difficult to determine whether the land in dispute was covered by the deeds at all the finding of the trial judge will not be disturbed, *Branham v. Northcutt*, (Ky. 1906) 97 S. W. 755.

Definite. If the description in a deed is such that a surveyor can locate it accurately it is sufficient, *Walker v. Lee*, 51 Fla. 360, 40 S. 881; *Downing v. Thompson's Ex.*, (Ky. 1906) 92 S. W. 290. A description of land in a deed was sufficient to operate as a conveyance of a one acre tract to be carved from a larger tract, where the deed provided for the conveyance of "one acre of land on the northwest side of the right of way limits." The right of way gave the southeastern boundary of the "one acre" and under reasonable construction two other boundaries would be the north and south lines of the larger tract. By the language of the deed, the location of the remaining line was to be ascertained by drawing a line parallel "to the street running south from Herring's Tavern" at such distance from the right of way as to enclose one acre of land, *Atlanta & W. P. R. Co. v. Atlanta B. & A. R. Co.*, 125 Ga. 529, 54 S. E. 736. Where a creditor's suit to sell land in payment of a debt described it by the names of the adjoining owners and the fact that the debtor lived thereon and avcrred that the plaintiff could give no better description because the deed thereof had not been recorded, but the judgment ordering the sale described it by metes and bounds, a deed to a purchaser following the wording of the judgment passed a good title as against collateral attack, *Guffy v. Anderson* (Ky. 1907) 102 S. W. 321. A. deeded certain meadow land to B., describing it as "another lot of meadow land lying

on the main Indian River stream the same deeded to me by John Burns, meaning and intending to convey all my right in the fresh meadow lands on both streams. But although the Burns deed granted high land as well as meadow, only the meadow was included in the deed to B., as the boundary of the meadow and high land could be easily determined, *Peasley v. Drisko*, (Me. 1906) 65 Atl. 24.

Indefinite. A plaintiff relied upon an unrecorded deed and the possession till death under it of the vendee. In the deed purporting to convey the land the description was too vague and indefinite to have effect as a conveyance of title, *Luttrell v. Whitehead*, 121 Ga. 699, 49 S. E. 691. A deed is void when the description is too vague such as "all that parcel of land containing 6 acres, situate in Franklin County on Towns Creek, beginning at a white oak on the east bank, thence north 38 w. to a pine corner, thence 58 w. to a white oak, thence down said creek to beginning corner," *Crawford v. Verner*, 122 Ga. 814, 50 S. E. 958. The entry of a levy in the following words: "Levied the within fi fa on a tract or parcel of land lying in Jefferson County, Georgia, 79th district, G. M., containing one hundred acres, more or less, levied on as the property of Thomas E. Walden, and legal notice given to tenant in possession," standing alone, is plainly insufficient in description, *Walden v. Walden*, 128 Ga. 126, 57 S. E. 323. Where a deed merely described land as beginning "at a white oak, running south of west 33 rods to a stake," then to other stakes, and containing six acres more or less, it was void for vagueness, but twenty years possession made a perfect title by adverse possession, *Kennedy v. Manus*, 138 N. C. 35, 50 S. E. 450. If a deed conveys 40 acres of land of a large tract of 150 acres but omits to give directions for apportioning the 40 acres or saying how the divisional line shall be run, the deed is void from indefiniteness, *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889. The plaintiff brought an action to recover land, described as follows: "Beginning at a white oak below the mouth of a branch opposite William Nelson, Jr., at the Upper Warm Springs on the east side of French Broad river." The court was requested by the plaintiff to charge that "if the springs were in the same location as in 1803 and the oak had disappeared, then the beginning shall be located at a point on the east side of the river directly opposite the spring as now located." This request was refused

on the ground of greater indefiniteness than the description in the grant and also, in the absence of the tree there was no method of locating its former position, *Rumbough v. Sackett*, 141 N. C. 495, 54 S. E. 421. Section 1707, Revisal 1905, provides that: "Claimant shall set forth in his entry where the land is situated, the present water courses and remarkable boundaries and the lines of any other person, if any, which divide it from other lands." Under this statute, the record of an entry of state lands, as follows: "J. B. enters and claims 640 acres of land on the waters of Texaway river in Transylvania county, N. C., beginning on the northwest corner of the Harriet Fisher homestead tract of land, and adjoining the lands of I. S. Fisher and others and runs various courses for complement," is too vague to affect the rights of one who enters surveys, pays his money and takes a grant, *Fisher v. Owen*, 144 N. C. 649, 57 S. E. 393.

Area. A deed purporting to convey the "south half" of a quarter section of land will operate to give the grantee a quantitative half without regard to the government rule as to excess above the standard amount for the quarter section, *Kirkpatrick v. Schaal*, (Neb. 1906) 110 N. W. 730. A deed conveying "a certain tract of land in the eighth district * * known and described in the plan of said district as part * * of lot No. 85, containing 50 acres and bounded as follows" is a conveyance by the tract, and a deficiency in the number of acres does not give the grantee ground for recovery if no fraud is shown, *Kendall v. Wells*, 126 Ga. 343, 55 S. E. 41. The statement of the quantity of land in the description "the west 5 acres of lot 12," no boundaries or monuments being given, is not simply an estimate of the quantity of land being conveyed, but is the essential and only description of the land conveyed, *Larson v. Goettl*, (Minn. 1908) 114 N. W. 840. A deed which purports to convey a triangular tract, of which two sides and the angle between are located, and provides that a survey shall be made and if it contains more than 10 acres then enough of the north part shall be cut off to reduce the total to 10 acres, conveys 10 acres where there is not less than that amount in the tract, *Hayes v. Martin*, 144 Ala. 532, 40 S. 204. Where a deed was ambiguous on its face as to whether the sale was by the acre or in gross, and also as to whether an implied warranty of quantity was intended, it is

prima facie a contract of sale in gross and without such warranty, *Winton v. McGraw*, 60 W. Va. 98, 54 S. E. 506.

Particular and general. A particular description in a deed will not control a general one when the former is evidently incomplete and defective, *Cornett v. Creech*, (Ky. 1907) 100 S. W. 1188. When an act of sale by A. to B. declares that he intends to sell all his land except such as is reserved, and then proceeds to reserve certain parcels, and finally to describe what he has conveyed, in an action to determine whether a certain outlying woodland passed under the act the reservation being so worded as to it as to need explanation is controlled by the grant which needs none, *Wilson v. Hoffman*, 115 La. 903, 40 S. 328. Where the words "being the boundary of land conveyed by Jones" contained in the description of land in a contract for the sale of timber were interlined after the contract was written for the express purpose of limiting the purchaser's right to cut timber the interlined clause, being a particular description, modifies the general description of the land as otherwise given in the writing, *Hall v. Smith*, (Ky. 1906) 97 S. W. 1125.

Lines presumed parallel. Where a tract sold is described as being so many arpents front by so many in depths, the side lines are presumed to run parallel and form right angles with the front lines, especially when it is admitted that one side line does form such a right angle, *Ramos Lumber Mfg. Co. v. Sanders*, 117 La. 615, 42 S. 158.

Omissions. Where a call has clearly been omitted by mistake the court will read it in, *Cornett v. Creach*, (Ky. 1907) 100 S. W. 1118. A deed of conveyance, in which land is described by sections, townships and ranges according to the government surveys and records, is good, even though the county be not mentioned, *Black v. Skinner Mfg. Co.* (Fla. 1907) 43 S. 919. The omission in the body of a turpentine lease to give the name of the state and county where the land lies does not invalidate it when at its head there appeared names of both, *Gex v. Dill*, 86 Miss. 10, 38 S. 193. Land may be conveyed by any description sufficient to identify it and for this purpose parol proof is admissible, but where the description in the deed is simply "northwest quarter of section 7, north of Castor river," and it appears that there are several sections 7 in Stoddard county north of Castor river, there being no range or township mentioned in the deeds, it is a

case not of latent ambiguity which might or might not be dissipated by parol proof identifying the subject of the grant, but of a patent ambiguity making the deeds absolutely void and as of no effect as the basis of a strict legal title, *Martin v. Kitchen*, 195 Mo. 477, 93 S. W. 780.

References to plats and other documents. Instruments referring to plats made by county auditors are made valid, though plats be defective in form, by Ia. Laws 1907, Ch. 247, Sec. 2. Where the description in a deed refers to a recorded plat of a survey the field notes are immaterial, *Haley v. Martin*, 85 Miss. 698, 38 S. 99. A plat referred to in the act as attached to and made a part thereof which was not in fact so attached, and discredited as unreliable by other words in the act, never recorded, and its whereabouts being unknown for many years, cannot control a specific grant, *Wilson v. Hoffman*, 115 La. 903, 40 S. 328. When at the end of a description in a deed there appear the words "less 80 acres sold to U. S. Oates before" the deed is not void for uncertainty. The invalidity for this reason, if any, applies to the exception and may be cleared up by evidence aliunde, *Loyd v. Oates*, 143 Ala. 231, 38 S. 1022. While it is better practice to so describe land in the pleadings and judgment that it may be identified by the commissioner executing the judgment, and by persons interested, without reference to any other paper or record, still, if it can be identified from the description given, the judgment is not void. Nor is the judgment erroneous on that account unless it be shown that the description is so vague that some one has been misled by it, or that it is probably misleading, so that injury has been done to the owner whose land is sold, *Brumley v. Nichols & Shepherd Co.*, (Ky. 1906) 92 S. W. 548.

Sec. 80. Evidence in aid of description. For a case when parol evidence was admissible to explain a complicated description in a deed see, *Reynolds v. Lawrence*, 147 Ala, 216, 40 S. 576. The description in a tax deed as "Home lot in lot 6, block 4, ward 1" contains a patent ambiguity to explain which oral evidence is inadmissible, *Smith v. Brothers*, 86 Miss, 241, 28 S. 353. A contract for the sale of land and timber thereon which described it as "virgin growth, long leaf, yellow pine timber land and rights owned by the first party" in a certain township and range, and on the edge of the C.

River, "was a sufficient description to allow the admission of parol evidence to show the definite location and to sustain a decree for specific performance, *Howison v. Bartlett*, 147 Ala. 408, 40 S. 757. Where one line in a deed was "thence southwesterly on a line parallel with the shore 300 feet, to a drill hole in the rock" the shore line being curved an ambiguity is created and parol evidence is admissible as to whether the above line should be run off 300 feet in a straight line or a curve to the hole "in the rock," *Haskell v. Friend*, 196 Mass. 198, 81 N. E. 962.

Statements by grantors as to the correct location of a boundary line are competent evidence for their vendees, *Gurley v. Starr*, (Ky. 1907) 99 S. W. 972. A prima facie case is established as to land being within a certain patent by the surveyor's report, not excepted to, and the surveyor's testimony as to the correctness of the lines. A witness may not state his opinion as to what land a deed covers, but merely such facts as he knows, *Ball v. Boughbridge*, (Ky. 1907) 100 S. W. 275. Where the description in a deed was as follows "commencing at the northwest corner of lot 10 in block 14—running south 100 feet; thence east 150 feet; thence north 100 feet; thence west 150 feet to the place of beginning;" the deed did not under the oral evidence produced cover lots 11 and 12 as well as 10, *Phelps v. Nazworthy*, 226 Ill. 254, 80 N. E. 756.

Sec. 81. What interest included under. "If a deed of bargain and sale or quitclaim on its face bears evidence that the grantors intended to convey and the grantees expected to be invested with an estate of a particular quality, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him as if a formal covenant to that effect had been inserted," *Bradley Estate Co. v. Bradley*, 97 Minn. 130, 106 N. W. 110. Where the grantor was a very old lady without other means of support, whose husband was insane, her quitclaim deed reading as follows: "I hereby convey all of my right, title and interest whether dower or other interest as the wife of J. C. D.,—more or less, hereby conveying and intending to convey all interest I may have in said land whether of dower or otherwise," was held to convey merely her dower or other marital

interest, not the interest she owned therein in her own right, *Dooley v. Greening*, 201 Mo. 343, 100 S. W. 43.

Partnership. A quitclaim deed by a surviving partner of "all interest of the party of the first part in and to the assets or partnership property—consisting of—lands and tenements—together with all rights of the said grantor as surviving partner to make deeds" passed only individual interest therein, *Jackson v. Gunton*, (Penn. 1907) 67 Atl. 467. Where the administrator of a deceased partner sold land, the title to which was standing in the partnership name, the purchaser acquired only the interest of the deceased partner on a settlement of partnership affairs and the proceeds of such a sale belonged to the estate of the deceased partner and were not part of the assets of the partnership, *Hartnett v. Stillwell*, 121 Ga. 385, 49 S. E. 276.

Sec. 82. Repugnant clauses.

See further, *ante* §§79-80.

Where the granting clause conveyed a fee simple, a habendum, providing for a reverter to the grantee's husband in case she died without issue, was void, *Carlee v. Ellsberry*, (Ark. 1907) 101 S. W. 407. Where a deed conveys "unto A., to him and his assigns forever" with a habendum and the usual warranty clause, a provision limiting it to a life estate repugnant to the above clause is void, *Wilkins v. Norman*, 139 N. C. 40, 51 S. E. 797. A deed in which the granting clause conveyed to A. B. during his life and to his heirs and assigns forever and the habendum to A. B. and to his heirs and assigns, in fee simple forever, passes a fee to the grantee, *Meacham v. Blaess*, 141 Mich. 258, 104 N. W. 579. When the habendum clause in a deed ran as follows: "to have and to hold—for life," and the granting clause, "the entire interest" of the grantors, it was held that although the language used in the habendum would ordinarily mean for the life of the grantee, it is ambiguous, and being in direct conflict with the granting clause is governed by the latter. The deed therefore conveyed only an estate for the life of the grantor, *Whetstone v. Hunt*, 78 Ark. 230, 93 S. W. 979. Where the habendum clause in a deed ran as follows: "To have and to hold * * * to J. B. B. for and during his natural life, with remainder at his death to his descendants in fee simple," and by another clause the grantor, the father of the grantee, reserved to him-

self the "possession, use and control" until the grantee became 21 years of age, and the grantor died while the grantee was still an infant, upon the subsequent death of the grantee, childless, unmarried, and intestate, the land descended to his heirs, not to the heirs of the grantor, *Baxter v. Bryan*, (Ky. 1906), 94 S. W. 633.

The first of two repugnant clauses governs in a deed in the absence of other evidence, therein differing from a will, *Pritchett v. Jackson*, 103 Md. 696, 63 Atl. 965, so where a deed conveys the fee simple in explicit words, following which is the declaration that "It is distinctly understood that I desire that the property shall be the property of W. during his lifetime should he survive the grantor and his wife." After the death of grantor the property in question was devised by the grantee to H. although W. survived the grantee. The court ruled that in a deed the first of two clauses, so repugnant should stand differing in this respect from a will, *Wolverton v. Hoffman*, 104 Va. 605, 52 S. E. 176.

Sec. 83. Exceptions and reservations.

Exceptions. A deed "excepting the part occupied by the right of way of the I. C. R. Co." excepts the fee as well as the right of way, *Hall v. Wabash R. Co.*, 133 Ia. 714, 110 N. W. 1039. A clause in a deed "saving, excepting, and reserving for himself the grantor herein, all the timber now growing and standing on the south half of the said premises" constitutes an exception so that the timber remaining at the death of the grantor passes to his heirs, *Williams v. Jones*, 131 Wis. 361, 111 N. W. 505. When three-fifths of an acre was fenced in from a corner of a tract of land and it was usually referred to as an acre, an exception of an acre on that corner deeded to the church, did not except a whole acre, but only so much as was occupied by the church, *Mayberry v. Beck*, 71 Kan. 609, 81 Pac. 191. A deed contained the following: "reserving to the grantors their heirs and assigns, all the rights, privileges, and benefits secured to the grantors under an oil and gas lease executed by said grantors to G. and G. dated April 9, 1894, with full power and right to renew or extend, change or modify, said lease with the said G. and G., or their heirs and assigns as fully, and to the same extent, as though this conveyance had not been executed. It is intended hereby to reserve all oil and gas privileges in and to said premises, and to

lease and transfer the same," and at the end of the warranty clause: "except as above set forth, and the right at all times to enter upon said premises to operate for oil and gas." Held, The above constituted an exception; the title to the surface passed to the grantees, that to the oil and gas remained in the grantors, *Moore v. Griffin*, 72 Kan. 164, 83 Pac. 395.

Reservations. A provision in a deed containing a reservation of timber that the grantor should "pay all taxes upon the lands until it shall give written release of said timber" means that "the grantor is to pay all taxes which have reached definite shape as a lien upon the lands by extension upon the tax roll prior to the release," *Sniveley v. Keystone Lumber Co.*, 129 Wis. 54, 108 N. W. 215. The testator executed a deed to trustees granting all his real estate with unrestricted right to sell and convey the property and he added a restriction in one of the last clauses of the will, reserving to himself the right to devise the property by will, but the restriction was null and void as the first clause governed, *Pritchett v. Jackson*, 103 Md. 696, 63 Atl. 965. Where a deed reads as follows: "For and in consideration of the sum of one dollar cash in hand paid, the receipt hereby acknowledged and other considerations which will be set forth in this deed" and nothing appears in the deed except a reservation clause viz.: "The parties of the first part do hereby reserve a life time dower and support of one the above set joint in this deed," the effect is to prevent the relinquishment of the widows' inchoate right of dower under Code 1906, §3079, and secures to the grantors maintenance and support from the land, for and during their natural lives. Cases fully cited, *Beverlin v. Casto*, (W. Va. 1907) 57 S. E. 411. Where a piece of land is duly described by metes and bounds and it is so provided that strips of land 60, 80 and 100 feet wide next to the boundaries of the tract are "hereby reserved for street purposes when the said quarter section shall be platted" the fee of the reserved land passes by deed to the grantee and he may recover possession of such land which he has not already dedicated for public streets, such as a strip of land 60 feet wide on one of the boundaries of the tract, and also 60 feet of a 100 foot strip on another boundary, where 40 feet of the 100 foot strip had been dedicated as a public street by the grantee, *Edwards v. Brusha*, 18 Okl. 234, 90 Pac. 727. A deed contained a clause which "reserved any" and all rights which may have

heretofore been conveyed to S.'s ditch, but it was not binding on the grantee either as a reservation or as an exception, and when S.'s rights to the use of the irrigation ditch expired, in accordance with the provisions of the grant by abandonment, the grantee obtained at once a perfect title to the right of way without entry or claim, *Burlington & C. R. Co. v. Colorado E. R. Co.*, (Colo. 1906) 88 Pac. 154.

Sec. 84. Building restrictions—Enforcement—Abandonment or loss. Where a deed referred to a "circle" shown on a plan which the vendor represented to the purchaser of the lots would always be kept open, the vendor may be enjoined from selling off the land in the "circle," *Marshall v. Columbia & E. C. Electric St. Ry. Co.*, 73 S. C. 241, 53 S. E. 417. A restriction in a deed that "no building shall be erected upon the granted premises to cost less than \$2,500, and but one building, a private stable excepted, shall be erected thereon" does not prevent the erection of a private stable costing \$2,500 alone without being an adjunct to a building already thereon or in the course of construction, *Peck v. Ha-tshor.* 189 Mass. 110, 75 N. E. 133. Under Mass. St. 1861, p. 492, c. 183, incorporating the "Massachusetts Institute of Technology" with power to hold certain land in Boston, and the form of deeds given purchasers of lots on adjoining streets from the Commonwealth who formerly owned the "Back Bay," so-called, it was held that the "Institute" could not sell or build over more than a third of the area occupied by it, as against the objection of owners across the street (2 Judges dissenting), *Wilson v. Mass. Institute of Technology*, 188 Mass. 565, 75 N. E. 128. A subsequent purchaser cannot enforce as against a prior purchaser of a lot across the street and 150 feet away a restrictive building covenant forbidding the erection of a building within 32 feet of the street, although both parties bought from the same grantor, in the absence of proof that the restriction was for the benefit of the complainant's lot or that there was a general scheme for the improvement of the street to be carried out by means of such a restriction, *McNichol v. Townsend*, (N. J. 1907), 67 Atl. 938. The defendant purchasing a lot was informed that there was a 5 foot restriction in the deed which would allow the construction of a bay window, but where it actually prohibited any part of the building within 5 feet of the boundary line

the defendant was charged with notice and should have found exactly what the restriction meant. A subsequent deed reforming the restriction saying it was inserted by mistake was void when an agreement with the adjoining lot owner showed that the grantor had agreed to insert a restriction and that the restriction must have been intentional, *Wahl v. Story*, (N. J. Ch. 1907) 66 Atl. 176.

"Flats." A restriction in a deed that the property is to be used for residence purposes only does not prohibit the erection of a four-family flat, *Tillotson v. Gregory*, (Mich., 1908) 114 N. W. 1025. The words "nothing less than a two-story dwelling house.....shall be erected on this lot" forbid the erection of a two-family flat having two stories, *Bagnall v. Young*, (Mich. 1908) 114 N. W. 674. A restriction in a deed contained a clause forbidding the erection of a flat on the land. A two-family house with an apartment on the first floor and one on the second floor was a "flat," and the fact that \$35.00 to \$40.00 per month rent was obtained from each suite did not constitute it an apartment house so that the builder was freed from the restriction, but it remained a "flat," *Lignot v. Jackle*, (N. J. Ch. 1906) 65 Atl. 221.

Automobile garage offensive. The owner of land divided into building lots and sold by deeds containing a restriction against user of the property for "any business offensive to the neighborhood for dwelling houses" can restrain the owner of another lot so restricted from erecting thereon an automobile garage to contain 125 cars, a repair shop and demonstration cars. The fact that in ten years the property in the vicinity will be more valuable for business purposes than residences does not make it inequitable to issue an injunction where no material change in conditions has occurred since the restrictions were originally put on, *Evans v. Foss*, 194 Mass. 513, 80 N. E. 587.

Enforcement. An agreement restricting to residence purposes property conveyed by deed containing no reference thereto creates an equitable servitude enforceable by any purchaser against any other, *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701. A grantor inserted in a deed a restriction "that no building or improvement of any kind should be erected more than two hundred feet, without the consent of A, the grantor, or her heirs, beyond the southerly bound-

ary of the lot of C, looking toward the ocean, nor within fifteen feet from the westerly side of said Park Place." The power to enforce this restriction did not continue with the heirs of A, but passed with the lot to the purchaser. *Hemsey v. Marlborough House Co.*, 68 N. J. Eq. 596, 61 Atl. 455. When a covenant referred to in deeds restricts the buildings on a certain street to not less than forty feet from the front of the lot, and there are a number of other houses with bay windows at a less distance which are not near the plaintiff's house, she is not estopped from bringing suit in equity against the owner of the adjoining house to compel him to remove a bay window projecting beyond the forty foot line which cut off her view, when she had notified him of the restriction which covered the whole street, making a general restrictive plan for the benefit of the lot owners, *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369.

Abandonment or loss. Where two-thirds of the purchasers of land had violated the restrictions providing for a setback of twenty feet the restriction could not be enforced as the original restrictive plan had evidently been abandoned, *Chelsea L. & I. Co. v. Adams*, (N. J. Err. & App. 1907) 66 Atl. 180. The fact that two other similar two-family houses which were "flats" were built nearby did not invalidate the restriction when the grantors in the deed imposing the restrictions against "flats" on the whole tract of land claimed they did not know that the other houses were built as "flats," *Lignot v. Jaekle*, (N. J. Ch. 1906) 65 Atl. 221. When a restriction on the lots of a town prohibited the erection of a house within 10 feet of the line, the right of the complainants to enforce it was not lost although 12 buildings in the business portion of the town violated the restriction, provided there was no evidence of a general disregard of the restriction throughout the town, *Barton v. Slifer*, (N. J. Ch. 1907) 66 Atl. 899. Equity will not enforce by injunction against its breach a covenant running with land in New York City, made in 1886, forbidding the use of certain land for 25 years for apartment houses where by the action of third parties the character of the neighborhood has completely changed, apartment houses abound, and the erection of the one in question will not injure the value of the plaintiff's land, but an injunction against its erection would greatly damage the defendant, *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961.

If grantors elect to treat the restrictions in their deed as abrogated and the servitude imposed on their remaining land as released, because of the failure of the grantee to observe conditions in the deed, they may not also maintain ejectment for the premises, *Tower v. Compton Hill Imp. Co.*, 192 Mo. 379, 91 S. W. 104.

Sec. 85. Recitals in deeds. When a deed states that the grantor's interest is an undivided half interest, the grantee is charged with notice of the existence of another half interest and an equitable half interest is not conveyed by such a deed although all the grantor's interest is sold, *Costello v. Graham*, (Ariz. 1905) 80 Pac. 336.

Sec. 86. Alterations. Where in drawing a deed confirming a prior quitclaim a warranty form was used the erasure of the words necessary to make it conform to a quitclaim was immaterial, *Wilder v. Aurora, De K. & R. Electric Traction Co.*, 216 Ill. 493, 75 N. E. 194. Evidence examined and held to show that an erasure in a deed was made after execution and without the grantor's knowledge or consent, *Waller v. Ward*, (Ky. 1907) 101 S. W. 341.

Sec. 87. Cancellation—Laches or limitations—Allowances to grantee or true owner.

Laches or limitations. After a delay of four months from the time of the discovery of fraud in the sale of land grantee will not be permitted to rescind, *Gallagher v. O'Neill*, (Neb. 1907) 11 N. W. 582. Under the special circumstances of the case it was held that seven years was too long for the grantor to wait before bringing suit to set aside a sale of land claimed by him to have been obtained by fraud, *Spoonheim v. Spoonheim*, 14 N. D. 380, 104 N. W. 845. One who seeks to avoid a conveyance for fraud is barred after a delay of seven years in enforcing his rights during which time he received partial payments on account of the purchase price, *Horn v. Beatty*, 85 Miss. 504, 37 So. 833. Under Sec. 5380, Rev. Codes 1905, one who is induced to enter into a contract to purchase land by the false representations of the vendor that he is the owner of the fee of the entire tract must take advantage of his right to rescind within six months, *Annis v. Burnham*, (N. D. 1906) 198 N. W. 549. A warranty deed

was given by the plaintiff to a creditor, and eleven years afterwards she brought suit to have the deed canceled on the ground that the grantee procured it by fraudulently representing that he would hold it in trust for the grantor, but the evidence was insufficient to prove the trust after such a length of time had elapsed, *Bluett v. Wilce*, 43 Wash. 492, 86 Pac. 853. When the grantees in a conveyance were husband and wife but the latter claimed the entire interest and brought a bill against her husband and the purchaser of his interest at an execution sale to remove the cloud on her title there was no misjoinder of parties or subject matter. As she asserted her ownership as soon as the purchaser attempted to disturb her rights and he did not change his position upon information obtained from her, she is neither estopped nor guilty of laches, *Hudson v. Wright*, (Mo. 1907) 103 S. W. 8.

Allowances to grantee. A deed to a woman in consideration of marriage cannot be rescinded after the marriage, because she cannot be put back in statu quo, *Jackson v. Jackson*, 222 Ill. 46, 78 N. E. 19. Where a block of stock was delivered in consideration of a deed to land, the consideration was sufficient and the plaintiffs had no ground to ask for the cancellation of the deed when they had not offered to return the stock, *Clint v. Eureka Crude Oil Co.*, 3 Cal. App. 463, 86 Pac. 817. After A had suffered a severe stroke of apoplexy, his confidential friend B persuaded him to sell him a lot of land at a very low price, including the rear on which there was a well, but as it was proved that A did not have sufficient mental capacity to make a deed, B's distributees were entitled to recover all the property on returning the purchase money, as A. had made no improvements on it, *Bidwell v. Piercy*, (N. J. Eq. 1906) 63 Atl. 261. The evidence was examined and held to show that a grantor was incompetent but as there was no fraud the conveyance will only be set aside upon a return of the consideration, *Peck v. Bartelme*, 220 Ill. 199, 77 N. E. 216. Where undue influence over the grantor was charged and lack of mental capacity, the administrator might have a deed canceled, on paying the value of the services on consideration of which the deed was executed, when their value was fixed by the jury, *Parker v. Ballard*, 123 Ga. 441, 51 S. E. 465.

Allowance to true owner. If a party to a suit has sold property erroneously adjudged to belong to him, he must

account to the true owner for the value, *Ure v. Ure*, 223 Ill. 454, 79 N. E. 153. Where a vendee obtained a deed through fraud, and conveyed the property to a *bona fide* purchaser, equity in a suit to cancel the deed will give a judgment to the original owner of the difference between the price received from the *bona fide* purchaser, and the price paid by the vendee, *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666.

Sec. 88. Cancellation for fraud—Confidential relations.

Inadequacy of consideration, see *ante* §78.

A deed by an aged father to his son was held upon the evidence to have been obtained by fraud and ordered cancelled, *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135.

When A by fraudulent representations induces B to accept the stock of a company which has no value as part of the purchase price of real estate, the contract may be rescinded when it is proved that A's representations in regard to a 10 per cent. cash payment on the stock are false, etc. Although A sells to C, B may obtain a reconveyance if it is shown that C was a party to the fraud, *Wagner v. Fehr*, 211 Pa. 435, 60 Atl. 1043.

The fact that an agent for the owner of land states a selling price which is higher than the real value does not justify the purchaser in claiming of the agent damages for false representations, *Bosley v. Monahan*, (Ia. 1907) 112 N. W. 1102.

When a debtor made a contract with A, providing that in consideration of making upset bids to prevent the confirmation of a sale to satisfy liens on land containing coal, that they should each have a half interest in the coal, the debtor may justly be deprived of the half interest when it is proved that he falsely represented that a prior lien had been paid off when A had purchased the property in consequence of such representations, *Cupp v. Lester*, 104 Va. 350, 56 S. E. 840.

Misrepresenting contents or effect of instrument signed.

If the vendors of timber agree to sell all except a certain amount which they reserve, and they are induced to sign a deed conveying the reserved timber as well, on the fraudulent representations that the deed is made out as orally agreed; then the vendors have a right of action, *Griffin v. Roanoke R. & Lumber Co.*, 140 N. C. 514, 53 S. E. 307. A purchased

a piece of property from B at a certain price and inserted a provision in the agreement that contracts to purchase parts of the property sold by A should be accepted by B as cash on the total purchase price. B did not know of the insertion as he did not read over the contract and had no lawyer to protect his interests. Then A pretended to have sold a small part of the premises for nearly the whole sum due, and induced B to accept the contract to purchase as cash by fraudulent representations. B had a right to cancel the agreement to sell to A, and A had no right to demand a conveyance of the rest of the land on payment of the small amount of purchase price remaining, *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617. Where the defendant, a brother of the testatrix, while a visitor at her house, induced her to convey him a fee in certain land subject to a life estate in her by the false representation that such conveyance would not deprive her of her right to convey it as she wished during her life, and that he meantime would not record it, a devisee of the property was entitled to have the deed vacated, *Busiere v. Reilly*, 189 Mass. 518, 75 Mass. N. E. 958. When the defendant's father, a negro lawyer, advised the plaintiff, an illiterate negress, that she was entitled to a pension and induced her to make a conveyance of her property because he said it was necessary in order to properly execute the pension papers, and she did so in ignorance of the fact that she was executing a deed, the conveyance was cancelled, *Johnson v. Hall*, 87 Miss. 667, 40 S. 1.

An action was brought by an old woman 80 years of age to set aside a deed, the execution of which she alleged had been procured by conspiracy and fraud, and signed upon the representation of the defendants that it was a will devising some land to her two daughters, the defendants knowing that she had already executed a paper giving said land to her two daughters upon a stipulation of support and reserving the right to cancel said paper, which paper had neither been delivered nor recorded, but put in safe keeping for delivery after her death. The defendant demurred on the ground that the plaintiff had only a life estate by reason of her testamentary deed to her daughters and that the conveyance to the grantees did not give full and lawful possession until the death of the plaintiff and therefore the plaintiff had no ground for action. The demurrer of the defendants

was adjudged frivolous, *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381.

Concealment. When the purchaser failed to disclose to the sellers material facts about their title which he knew they were ignorant of and in addition paid a grossly inadequate consideration, the conveyance was ordered cancelled, *Smith v. Woodson*, (Ky. 1906) 92 S. W. 980.

Opportunity to inspect. A purchaser has no right to bring an action for fraud when the owner has exaggerated the value of his property, provided the purchaser had equal opportunity to inspect it and see the value, *Long v. Kendall*, 17 Okl. 70, 87 Pac. 670.

Area. When an agent selling a tract of land represented that it contained 21 acres more than it actually did and offered to have it surveyed, and the deed also specified 21 acres too many, this was a sale by the acre and not a sale in gross, and the grantee was entitled to a proportionate reduction in the price of the property, *Berry's Ex'x v. Fishburne*, 104 Va. 459, 51 S. E. 827.

Character of land. An owner of arid land on a ridge 50 miles from S. listed his property with a real estate agent, representing that it was good bottom land in a valley only three miles from S., with plenty of water, but as these representations were fraudulent, a sale made in accordance therewith might be set aside, *Reilly v. Gottleb*, 43 Wash. 9, 85 Pac. 675.

Confidential relations. In a suit to set aside a deed from a parent to his child the parent has the burden of proof of showing undue influence, the father in absence of evidence to the contrary being presumed to be the dominant party, *McLeod v. McLeod*, 145 Ala. 269, 40 S. 414. The evidence was examined at great length and held to show that a certain conveyance made to a person with whom the grantor was on confidential relations, was not in fact upon a fair consideration, *Jackson v. Grissom*, 196 Mo. 624, 94 S. W. 263. In an action to cancel a deed from an aged woman to her son of all her real property, where the mother was entirely dependent upon her son in all her dealings, the burden will be upon the son to show that the deed was not obtained through undue influence, *Fjone v. Fjone*, (N. D. 1907) 112 N. W. 70. A mother made a deed to her son of her property when she was 64 years old and unable to read or write English, and the

burden of proof was on the son to prove that the deed was not invalid on account of undue influence and the confidential relations existing between the mother and the son, who had a power of attorney from her; but where her attorney translated the deed to her and it was her intention to make a gift of her share in the ranch to her son, as her husband was doing, the conveyance for the nominal consideration of \$1.00 was valid, *Arellanes v. Arellanes*, (Cal. 1907) 90 Pac. 1059. The ordinary relations existing between a woman and her daughter and son-in-law with whom she is living do not constitute a fiduciary relation making a deed by her to her daughter *prima facie* invalid in the absence of fraud and undue influence, *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 403. The mere fact that a son took any part whatever in procuring the execution of a deed by his father to him does not make out a case of confidential relations and shift the burden to the son showing that the deed was voluntarily made and not due to undue influence, *Bain v. Bain*, (Ala. 1907), 43 S. 562. When the grantor had lived with her daughter and son-in-law for thirty years and consequently had confidential relations with them, and the evidence showed that she was in bad health for two years prior to her death so she required the services of a nurse, the burden of proof rested on her daughter and son-in-law to prove that a deed made to them when the grantor was dependent on them through sickness was the voluntary act of the grantor and that undue influence was not exercised, especially when there was no one else for the grantor to consult at the time of making the deed, *Horner v. Bell*, 102 Md. 435, 62 Atl. 736. Although a deed was given by the mother to her son of the home farm retaining a life interest in it and she had frequently expressed her intention to give it to him, the deed is not void because he acted as her agent in the care of the property and was in confidential relations with her when she had the deed drawn up by her own attorney and delivered it after consulting him, *Reed v. Reed*, 101 Md. 138, 60 Atl. 621.

Sec. 89. Cancellation—Fraudulent representations as to use to be made of property. A bill to set aside conveyances to a railroad upon the ground of alleged false representations which states that the railroad company represented that it was "about to construct," that a "passenger depot

would be located" and that the "right of way was to be a part of the main line," but that after the conveyance the company abandoned its right of way, was demurrable because the allegations did not appear to have been false when made, *Stannard v. Aurora Ry. Co.*, 220 Ill. 469, 77 N. E. 254.

Damages. Where through fraudulent representations that a building would be erected upon land, increasing thereby the value of his adjacent property, the owner was induced to convey for less than value, reconveyance was directed, after the purchase money was refunded, from which the amount of damages as assessed by the jury for the buyer's failure to erect the house as agreed, was deducted, *Troxler v. New Era B'd'g Co.* 137 N. C. 51, 49 S. E. 58. When a deed has been secured at a very low price in consequence of representations that the property was to be used as a mill site, and that the owners would be given employment and free firewood, they were entitled to have the deeds to the purchasers and a transfer from them to an adjoining owner cancelled on repayment of the consideration, *McMullen v. Rosseau*, 40 Wash. 497, 82 Pac. 883.

Sec. 90. Cancellation for undue influence.

Undue influence by one in confidential relations with another, see *ante* § 88.

Mere advice, argument, or persuasion, if the grantor's mind acts freely thereunder, does not constitute undue influence, though it may lead to the making of the instrument when it would not otherwise have been made, *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 403. To set aside a deed upon the ground of undue influence it is not sufficient that the grantor was influenced by the beneficiary in the ordinary affairs of life, or that he was in close touch and upon confidential terms with him; but there must be a malign influence resulting from fear, coercion, or any other cause which deprives the grantor of his free agency in disposing of his property, *Boggianna v. Anderson*, 78 Ark. 420, 9427, 51.

The maxim "in pari delicto" does not apply where a married woman sues to set aside a deed of her separate property made by her under express or implied threats of the prosecution of her husband, and to save him from prosecution, whether the threatened prosecution was lawful or unlawful,

when she was sick and nervous and when she does not appear to have had abundant opportunity for consideration and consultation with disinterested advisers, *Burton v. McMillan*, (Fla. 1907) 42 S. 849.

The bishops of a church by undue influence obtained the execution of a deed which was delivered without the grantor's knowledge or consent, and the deed was void, *Birdsall v. Leavitt*, (Utah 1907) 89 Pac. 397. Although three witnesses testified that the grantee of a deed to mining property was not under duress when he made the deed at their instance, the evidence of the grantee and his stenographer, together with the circumstances of deeding away valuable property without consideration, were sufficient to establish duress, *McClelland v. Bullis*, 34 Colo. 69, 81 Pac. 771. Where the defendant had obtained a deed from his father by threats and undue influence, without consideration it was revocable at the instance of the other heirs, *Groesbeck v. Groesbeck*, (Or. 1907) 88 Pac. 870. Evidence that a man marries a second time within two months of the death of his first wife, with whom he lived 52 years, that he changes his investments from farm mortgages to farm lands, that he becomes more talkative about his business affairs, conveys to each of his sons the farm on which he lives, that his memory is impaired will not be sufficient to set aside a deed to the wife of their residence and a tract of 300 acres of land on the ground of undue influence, *Dean v. Dean*, 131 Ia. 487, 108 N. W. 1051.

In an action by a wife's guardian to have her conveyance declared void because of undue influence it was held upon the evidence that the plaintiff had not sustained the allegations of his bill by clear and convincing proof, *Willis v. Baker*, 75 Ohio 291, 79 N. E. 466. When a father about to be married transferred a part of his property to his sons, which he had intended to convey to them on the ground that his wife would be undesirable as a neighbor after his death, and a bond for a deed was given for the home place subject to use for life by the father, this was not undue influence and the deeds were valid, *Jenkins v. Rhodes*, 106 Va. 564, 56 S. E. 332.

Sec. 91. Cancellation for mistake.

Evidence of mistake, when competent, see *post*, §156.

Reformation for mistake, see *post* § 490.

Where in a bill to cancel a deed on account of fraud no relief was asked by the defendant in the nature of reformation it was proper to cancel it upon the ground of mutual mistake if the evidence shows that the parties made a mistake in the description of the land, *Cullison v. Connor*, 222 Ill. 135, 78 N. E. 14. Where a deed called for only 160 acres but the natural boundaries which were definite and unmistakable covered an area of 500 acres the grantee took title to the large tract subject only to the grantee's right to have relief by rescission upon the ground of fraud or mistake. This relief must be sought within 15 years of the conveyance, *Kendrick v. Burchett*, (Ky. 1905) 89 S. W. 239.

DESCENT

Sec. 92. In general—Statutes. The holder of state land under certificates of purchase owns such an equitable estate as descends to his heirs, *In re Grandjean's Estate*, (Neb. 1907) 110 N. W. 1103.

Statutes. The procedure to determine the descent of real estate after the settlement of the estate of the intestate is provided for by Col. Laws of 1907, Ch. 247. In the case of small estates, Ch. 248. In general, Ch. 249. The proceedings for the determination of heirship and title to estates of deceased persons are prescribed by Id. Laws 1907, Sen. Bill No. 78. As to the heirs of a decedent who leaves no issue under Mass. Rev. Laws, c. 140, section 3, cl. 3, see *Holmes v. Holmes*, 194 Mass. 552, 80 N. E. 614. Subdiv. 7, Section 4471, Gen. St. 1894, providing for the descent of real estate inherited by a child from its father's estate, construed, *In re Kenny's Estate*, 97 Minn. 150, 106 N. W. 344. Sec. 3648 Rev. Laws 1905, designating the order in which property of intestates shall descend, is amended by Minn. Laws 1907, Ch. 36. The descent of property is regulated by Neb. Laws 1907, Ch. 49.

Sec. 93. Adopted children. Upon an adoption by a childless old man living in Louisiana of a niece living in Massachusetts by proceedings which constituted a valid adoption under Massachusetts laws, such adoption decree will be

given full faith and credit in Louisiana, where not repugnant to public policy or good morals or the Louisiana Laws of inheritance, Succession of Caldwell, 114 La. 195, 38 S. 140.

Evidence. Where the records and files of an old adoption proceeding had been burned up it was held that the oral evidence produced showed that the court had jurisdiction and made a valid decree of adoption, Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767.

Agreement for adoption. An instrument providing for the adoption of a child and containing an agreement by the adopting parents that the child shall have all rights of inheritance is not testamentary or within the statute of frauds and may be specifically enforced by the adopted child as against the other children of the adopting parents, Chehak v. Battles, 133 Ia. 107, 110 N. W. 330. In a suit brought against the administratrix of an estate by one who had for twenty years taken care of the home and invalid mother of the intestate, under a contract in which he agreed in consideration of service to be performed, "that petitioner would share a child's interest in whatever was accumulated by the three" during the life of the mother and her son, it was held that this agreement was unenforceable as to any property belonging to the mother as she was not a party to the contract, and as the son took no legal steps for the adoption of the plaintiff as his child there was no breach of contract when during his last illness he only expressed a desire that the plaintiff should share as an heir to his estate. The remedy of the plaintiff was to sue in assumpsit for the services performed by her, Bunting v. Dobson, 125 Ga. 447, 54 S. E. 102.

Statutes construed. An illegitimate child was legally adopted by a married couple, inherited a farm from her adopted mother, sold it but kept the proceeds intact, gave birth to an illegitimate child and died. Upon the death of this latter illegitimate child, while four months old, the proceeds of the sale of the farm passed under the Illinois Statutes to the heirs of the adopted parents, Swick v. Coleman, 218 Ill. 33, 75 N. E. 807. Mass. Rev. Laws, c. 154, section 7, as to inheritance by adopted children, construed, Brown v. Wright, 194 Mass. 540, 80 N. E. 612. Under Mass. St. 1876, p. 210, c. 213, as to the rights of adopted children under his adopting parent's will a child adopted after the enactment of such statute was not entitled to take upon the death of her

adopted father as "heir" or "issue" or her adopted father under the will of her adopted grandfather, *Blodgett v. Stowell*, 189 Mass. 142, 75 N. E. 138. Missouri Revised Statutes 1899, section 2908, as to descent construed together with sections 5246 and 5248 with regard to adopted children, *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585.

Sec. 94. Half-bloods—Bastards—Children of white and negro. The Illinois Statutes as to the legitimation of bastards construed, *Miller v. Pennington*, 218 Ill. 220, 75 N. E. 919. The evidence examined and held to show that a man recognized a child born to his wife before their marriage as his child so as to legitimize her under Missouri Rev. St. 1899, section 2917, *Breidenstein v. Bertram*, 198 Mo. 328, 95 S. W. 828.

Kentucky Statutes 1903, sections 2097 and 2098, declare a marriage between a white woman and a negro void and accordingly their children cannot inherit from their father, *Moore v. Moore*, (Ky. 1907) 98 S. W. 1027.

Half-bloods. Where the ordinary appointed as administrator of an estate the brother of the half-blood, selected in writing by five of the inheriting kin, instead of a sister of the whole blood selected in the same manner by another sister of the whole blood, the law of relationship should not be followed to the exclusion of that of distribution, Civ. Code 1895, § 3367, subd. 3, *Raburn v. Bradshaw*, 124 Ga. 552, 52 S. E. 922. The testator bequeathed her estate to A for life, with the remainder to A's children, "and in default of any such child or children then living" to B. When A's only child died before the death of A, and B had also died, then a petition by A and C who were the only parties interested in the estate was granted for the sale of the estate as A was a widow 66 years old, and the brothers and sisters of the half-blood had no interest in the property, *Brooke's Estate*, In re, 214 Pa. 46, 63 Atl. 411.

Sec. 95. Advancements.

Advancements as valid consideration for deed, see *ante*, §78.

Kentucky Statutes 1903, section 1407, as to advancements construed, *Hill's Guardian v. Hill*, (Ky. 1906) 92 S. W. 924. Missouri Rev. St. 1899 section 2913, as to advancements ap-

plies to grandchildren as well as children, *Johnson v. Antrikin*, 205 Mo. 244, 103 S. W. 936. Under the Mississippi Ann. Code, 1892, sections 1545 and 4496, a child who has received a portion of the estate during the life of the testator and given a receipt therefor is thereafter disregarded in the distribution, *Callicott et al. v. Callicott*, (Miss 1907) 43 S. 616. When a father first settled his three daughters upon tracts of land, telling them that he would make them each a deed thereof and that they could pay the taxes but need not account for the rents and later conveyed the tracts to each of them respectively, such conveyances were advancements for which they must account in the settlement of his intestate estate upon the basis of the value of the tracts at the time of the conveyances, *Ward v. Johnson*, (Ky. 1906) 97 S. W. 1110. A will gave a life estate to the widow with the powers of a trustee to make advances to such of her children as she saw fit, keeping an account thereof, and such advances to be deducted from the share of the children when the estate was settled at her death, but she was not compelled to make equal advances to each of the children as the matter was left to her discretion, *Trout v. Pratt*, 106 Va. 431, 56 S. E. 165.

It was held that the following agreement: "Whereas, there is an unfortunate suit pending—of my father—against me: now, in order to settle said suit—and in consideration that my father has this day given and paid to me—one thousand dollars, which I accept in full of all my present or future interest in my father's estate, whether real, personal or mixed, and I hereby forever acquit, release and relinquish all right or claim to or in his estate, and will not claim any part of his estate as against him or any of his heirs or devisees": was void. The court said: "when the parent, under a contract like the one in question, advances to this child money or property,—it should be charged to the child as an advancement," *Elliott v. Leslie*, (Ky. 1907) 99 S. W. 619.

Sec. 96. Rights of creditors against heirs and devisees. Kentucky Statutes, 1903, sections 2084, 2088, making devisees liable for debts of the estate to the extent of the land they receive, construed, *Withers' Admr. v. Withers' Heirs*, (Ky. 1907) 100 S. W. 253; *Cline v. Waters*, (Ky. 1906) 90 S. W. 231. "The distributive share of the real estate of an heir, debtor to the estate of his ancestor, is not

chargeable with such indebtedness either as against the land or the proceeds of the sale thereof in the hands of the administrator; such indebtedness is to be collected by proceedings brought the same as for collecting any other indebtedness due the estate," *Marvin v. Bowlby*, 142 Mich. 245, 105 N. W. 751.

A decedent's land descends instantly to the heir or devisee and does not become assets for payment of debts unless the personalty is insufficient therefor under Alabama Code, 1896, section 125. Lands taken by heirs and fraudulently conveyed by them to purchasers with notice can be subjected to reimbursement of the administrator's surety to pay a judgment recovered against him on a debt of the intestate, *Baldwin v. Alexander*, 145 Ala. 186, 40 S. 391. An agreement between devisees whereby they turned all the personalty to one of their number upon a written agreement whereby the recipient agreed to credit it upon his share in the land constituted an equitable assignment to such other devisees of his interest in the land which was entitled to priority over an execution lien or his share later acquired with notice of the assignment, *Thompson's Ex'rs v. Stiltz*, (Ky. 1906) 96 S. W. 884.

DESCRIPTION OF REAL ESTATE

Description in deeds, see *ante* § 79.

Description of property sufficient for assessment of taxes, see *post* § 536.

Description in wills, see *post* § 642.

Mistake in description of land in will, see *post* § 642.

DRAINAGE

Of or across railroad right of way, see *post* § 484.

See further, IRRIGATION, WATERS.

Taking of land by eminent domain for drainage purposes, see *post* § 119.

Sec. 97. Statutes regulating ditches, levees and drainage districts noted and construed.

California. Irrigation districts may provide for drainage made necessary by irrigation, Cal. Stat. 1907, Ch. 298, Pol. Code, 3454, 3471, regarding reclamation districts, and Code Civ. Proc. §1240, were construed to invest trustees of reclamation districts with the right to take land by right of eminent domain for levees, canals, etc. Full discussion, see Reclamation Dist. No. 551 v. Superior Court of Sacramento County, (Cal. 1907) 90 Pac. 545.

Florida. Ch. 5377, Fla. Laws of 1905, providing for a Board of Drainage Commissioners and for the establishment and maintenance of drainage districts is amended by Fla. Laws, 1907, Ch. 5709.

Idaho. Various sections of "An Act to provide for the establishment of drainage districts," approved March 11, 1903, are amended by Id. Laws, 1907, Ho. Bill No. 109.

Illinois. Circuit courts given jurisdiction over organization of drainage districts by Ill. Laws, 1907, p. 220. Method of electing commissioners of drainage districts prescribed by Ill. Laws, 1907, p. 273, amending sec. 15, Act of June 27, 1885. Act of May 29, 1879, providing for construction of drains and organization of drainage districts amended by Ill. Laws, 1907, p. 274. Election of trustees of sanitary districts provided for by Ill. Laws, 1907, p. 287, amending sec. 3, Act of May 29, 1889. Sanitary districts are created in certain localities and drainage and protection of same provided by Ill. Laws, 1907, p. 289. The Illinois Drainage Act (Laws, 1874, p. 121) as amended by Laws, 1885, p. 108, construed, *Hutchins v. Vandalia Levee & Drainage Dist.*, 217 Ill. 561, 75 N. E. 354. The Illinois Drainage Act (Laws, 1879, p. 121) construed, *Stack v. People*, 217 Ill. 220, 75 N. E. 347. *Hurd's Ill. Rev. St.* 1903, pp. 776, et seq., as to proceedings to determine the amount of contribution between drainage districts, construed, *Union Drainage Dist. v. Drainage Dist.*, 220 Ill. 104, 77 N. E. 98. Ill. Laws 1889, p. 116, is not applicable to ditches or drains controlled by a drainage district organized as authorized by the Farm Drainage Act of 1885 (Laws 1885, p. 77), *Snyder v. Baker*, 221 Ill. 608, 77 N. E. 1117. Various sections of the Illinois Statutes as to the organization of drainage districts, construed, *Barnes v. Drainage Com'rs*, 221 Ill. 627, 77 N. E. 1124. The Illinois Drainage Act (*Hurd's Rev. St.* 1905, c. 42) construed, *Joliet v. Drainage Dist.*, 222 Ill. 441, 78 N. E. 836. The Illinois Drainage

Law, construed, *Simpkin v. Commissioners Long Island Levee Dr. Dist.*, 223 Ill. 67, 79 N. E. 38. *Hurd's Illinois Rev. St.* 1905, p. 806, c. 42, (Farm Drainage Act) construed, *Carr v. People*, 224 Ill. 160, 79 N. E. 648. As to the reasonableness of a village ordinance creating a drainage district, see, *Snyder v. West Hammond*, 225 Ill. 154, 80 N. E. 93. The Illinois Farm Drainage Acts, construed, *Shanley v. People*, 225 Ill. 579, 80 N. E. 277; *People v. Ryan*, 225 Ill. 359, 80 N. E. 279. *Hurd's Illinois Rev. St.* 1905, c. 42, section 2, as to the organization of a drainage district, construed, *People v. Munroe*, 227 Ill. 604, 81 N. E. 704.

Indiana. The general subject of drainage is covered by Ind. Laws 1907, Ch. 252. The methods for the repair of public ditches and drains are provided by Ind. Laws 1907, Ch. 275. Burn's Indiana Ann. St. 1901, sections 3598-3606, as to the rights of a city to construct drainage "inlets" or "outlets" and the procedure thereunder, construed, *City of Huntington v. Amiss*, 167 Ind. 375, 79 N. E. 199. Burn's Indiana Ann. St. 1901, section 5637, as to allotments for repairs of public drains, construed, *Beery v. Driver*, 167 Ind. 127, 76 N. E. 967. Various Indiana statutes as to appeals in ditch opening proceedings, construed, *Smith v. Gustin*, (Ind. 1907) 80 N. E. 959.

Iowa.—Secs. 2, 5, 28, 42, 44 and 48 of Ch. 68, Laws of 1905, relative to survey of drainage districts are amended by Ia. Laws 1906, Ch. 84. Code Tit. 10, c. 2, as amended by Laws 30th Gen. Assem., p. 59, c. 67, relative to construction of drainage ditches, construed, *Ross v. Board of Sup'rs of Wright County*, 128 Ia. 427, 104 N. W. 506. Ch. 68, Laws 1904, providing for public drains, construed, *Zinser v. Board of Sup'rs of Buena Vista County*, (Ia. 1907) 114 N. W. 51.

Maryland. Art 25, secs. 71, 73 and 74, Code of Pub. Gen. Laws, relative to proceedings in connection with drains, is amended by Md. Laws 1906, Ch. 137.

Massachusetts. Ch. 49, sec. 24, Rev. Laws, providing that plans, descriptions and records of main drains and common sewers shall be kept in city or town offices, amended by Mass. Acts 1907, Ch. 365.

Michigan. Secs. 4319 and 4379, Comp. Laws 1897, concerning applications for drains and the cleaning of them are amended by Mich. Laws 1907, No. 111. Local Acts 1905, No. 592, providing for the appointment by the governor of

a drain commissioner to serve until the election of his successor is constitutional, Attorney General ex rel. Alexander v. McClear, 146 Mich. 45, 109 N. W. 27. Comp. Laws, sec. 4379, regulating the cleaning of drains, construed, Freed v. Stuart, 147 Mich. 31, 110 N. W. 137. Comp. Laws sec. 4322, 4325, 4326, 4379, 4382 and 4384, relative to improvement of drainage ditches, construed, Patterson v. Mead, 148 Mich. 659, 112 N. W. 742. Acts 1901, No. 27, providing for a special drain commissioner, where the regular one is disqualified by reason of interest, construed, Tuttle v. Bishopp, (Mich. 1907) 114 N. W. 69.

Minnesota. Proceedings under Ch. 230, Gen. Laws 1905, legalized by Minn. Laws 1907, Ch. 9. Acts of county commissioners in establishing ditches legalized by Minn. Laws 1907, Ch. 72. The expense of maintaining ditches in counties of 292,000 or more inhabitants is regulated by Minn. Laws 1907, Ch. 75. The alteration of contracts for drainage ditches is permitted by Minn. Laws 1907, Ch. 138. The drainage of swamp lands—where several owners are affected—is regulated by Minn. Laws 1907, Ch. 191. Drainage of swamps in counties of less than 10,000 inhabitants is regulated by Minn. Laws 1907, Ch. 330. Ch. 230, Gen. Laws 1905, providing for drainage of lands is amended by Minn. Laws 1907, Ch. 367. Ch. 145, Gen. Laws 1905, relating to the extension of ditches, is amended by Minn. Laws 1907, Ch. 371. A judicial system of drainage is provided for in detail by Minn. Laws 1907, Ch. 448, and a state drainage commission by Ch. 470. Laws 1901, c. 254, relative to bonds given with petitions to establish drainage ditches, Gugisberg v. Eckert, 101 Minn. 116, 111 N. W. 945.

Mississippi. The proceedings necessary for the organization of drainage districts are prescribed in detail by Miss. Laws 1906, Ch. 132.

Missouri. Proceedings prescribed for procuring the cleaning of drainage ditches—in lieu of Ch. 122, Art. 4, secs. 8307 and 8308, Rev. Stat. 1899, Mo. Laws 1907, p. 333. The organization of levee districts is provided for by Mo. Laws 1907, p. 335, amending Ch. 122, Art. VII., sec. 8361, Rev. Stat. 1899. The manner in which supervisors of drainage districts are to exercise the right of eminent domain is set forth in Mo. Laws 1907, p. 337, amending Ch. 122, Art. 7, sec. 8364, Rev. Stat. 1899. Proceedings for the location of ditches and

levees are regulated by, Mo. Laws 1907, p. 341. Drainage districts may contract with cities and with each other for outlets by Mo. Laws 1907, p. 344. The powers of supervisors of drainage districts are defined by Mo. Laws 1907, p. 345, amending Laws 1905, sec. 8259b. The powers of the boards of supervisors of drainage districts are enumerated in Mo. Laws 1907, p. 348.

Nebraska. Drainage districts are provided for and their government regulated by Neb. Laws 1907, Ch. 153. Ch. 161, Laws 1905, providing for the organization of drainage districts, does not contemplate the inclusion of a railroad right of way, in such district, *Barnes v. Minor*, (Neb. 1907) 114 N. W. 146. The Drainage Act of 1881 (Laws 1881, c. 51) construed, *Campbell v. Youngson*, (Neb. 1907) 114 N. W. 415.

New Jersey. Commissioners to supervise the cleaning of ponds and swamps are authorized by N. J. Laws 1906, Ch. 161. Conveyances under Drainage Act of March 8, 1871, for terms of more than 200 years to be considered as in fee simple, N. J. Laws 1906, Ch. 198. Cities are authorized to improve streams for drainage and if necessary to acquire land by condemnation by, N. J. Laws 1907, Ch. 111.

New York. Pt. III, Ch. 8, Tit. 16, Sec. 1, Rev. Stat., authorizing petitions to the supreme court for the appointment of drainage commissioners is amended by N. Y. Laws 1906, Ch. 115.

North Dakota. Ch. 23, Political Code, relating to drainage, is amended in various particulars by N. D. Laws 1907, Ch. 93. A board of drain commissioners acquires jurisdiction over a proposed drain on the issue of orders after a hearing on a petition in regular form, *Alstad v. Sim*, (N. D. 1906) 109 N. W. 66. Sec. 1821, Rev. Code 1905, construed as to acquisition of jurisdiction by board of drain commissioners in *Sim v. Rosholt*, (N. D. 1907) 112 N. W. 50.

South Dakota. The general subject of drainage, for protection of public health and for the benefit of agricultural lands is covered by So. D. Laws 1907, Ch. 134.

Utah. Secs. 760-779, Rev. St. 1898, as amended by Ch. 124, Laws 1905, relating to organization of drainage districts, amended by Utah Laws 1907, Ch. 108.

Virginia. Drainage districts are created by Va. Acts 1906, Ch. 188.

Wisconsin. The purchase of machinery for use of drainage districts is regulated by Wis. Laws 1907, Ch. 444. Rev. St. 1898, secs. 1379-13, providing for the appointment of three "competent" persons as drainage commissioners, construed, *In re Cranberry Creek Drainage District*, 128 Wis. 98, 107 N. W. 25. Rev. St. 1898, secs. 1379-11 to 17, as amended by Laws 1901, c. 43, relative to the establishment of drainage districts and the appointment of commissioners, construed as to appeal from order of appointment, *In re Horicon Drainage Dist.*, 129 Wis. 42, 108 N. W. 198. Secs. 1360, 1363 and 1364, Rev. St. 1898, giving town supervisors power over drainage ditches, construed, *Fraser v. Mulany*, 129 Wis. 377, 109 N. W. 139.

Sec. 98. Constitutionality of statutes—Power of officers under. *Constitutionality.* Hurd's Illinois Rev. St. 1905, c. 42, par. 115, as to drainage district's violates sections 9 and 10 of article 9 of the Illinois Constitution, *Morgan v. Schusselle*, 228 Ill. 106, 81 N. E. 814. The provisions of the Illinois Drainage Act (2 Starr & C. Ann. St. 1896, p. 1508, c. 42), par. 44, providing for an assessment of damages by a jury or commissioners, is unconstitutional because it deprives the landowner of the right to a jury, *Hull v. Sangamon River Drainage Dist.*, 219 Ill. 454, 76 N. E. 701. C. 230, Laws 1905, relating to the construction of drainage ditches is constitutional, *Miller v. Jensen*, (Minn. 1907) 113 N. W. 914. A provision of the Constitution that "private property shall not be taken for public use without compensation" does not forbid the passage of an act for the drainage of agricultural lands which habitually retain surface water; the test being that the proposed improvements are beneficial to persons not solely as individuals but as members of the community, *Sisson v. Board of Sup'rs*, 128 Ia. 442, 104 N. W. 454. Ch. 191, Laws 1907, authorizing the condemnation of land and levying of assessments for private drainage ditches held unconstitutional, *In re Schubert*, (Minn. 1907) 114 N. W. 244.

Authority given by statute. Rev. St. 1898, secs. 1379-11 to 31 give drainage commissioners no power to destroy a navigable river and lake, *In re Dancy Drainage Dist.*, 129 Wis. 129, 108 N. W. 202.

The Act of March 2, 1903 (St. 1903, p. 67, c. 61) which amends Pol. Code, sec. 3443, providing that the right to

purchase land under the provisions of these acts might be contested on the ground that the land had been reclaimed and made fit for cultivation, was construed, *Boggs v. Ganeard*, 148 Cal. 711, 84 Pa. 195. Under 2 Starr & C. Ann. Illinois St. 1896, c. 42, §§40, 42, drainage district commissioners may not attach to the district streets and alleys of an adjunct village which had connected its drains with those of the district, nor levy upon such village or such streets and alleys, as assessment, *Drainage Com'rs v. Village of Cerro Gordo*, 217 Ill. 488, 75 N. E. 516. The city board of levee commissioners of Sacramento and the State board agreed on a plan of reclamation, and as the State board was out of funds it authorized the city board to build a part of the levee which extended beyond the city limits, which was done by condemning the land and awarding damages. The Act of 1862, sec 6, (St. 1862, p. 162, c. 158) only granted the city the right to condemn land outside the city for the purpose of obtaining materials to construct the levee, and the right was not granted to condemn land for the erection of a levee, therefore such condemnation was invalid, *McCarthy v. Southern Pacific Co.*, 148 Cal. 211, 82 Pac. 615. The Ohio County Ditch Law, Rev. St. 1906, title 6, c. 1, giving county commissioners authority to construct ditches does not authorize them to divert the water of a natural stream into a ditch and thereby deprive a riparian proprietor of his water power, *Greene County Com'rs v. Harline*, 74 O. St. 318, 78 N. E. 521.

Laws 1899, p. 382, s. 19, granting a canal or ditch company the right to require claimants of water to pay for it in advance, was construed not to allow the company to shut off water when such advance payment had not been required, but a law suit was the only means to enforce the payment of arrearages, *Shelby v. Farmer's Co-op. Ditch Co.*, 10 Idaho 723, 80 Pac. 222.

Mill sites. The provision for the creation of drainage districts does not apply to the benefit of subsequent purchasers of swamp lands already overflowed by the establishment of dams for manufacturing purposes under Act Cong. July 26th, 1866, c. 262, s. 9, 14, Stat. 253 (U. S. Comp. St. 1901, p. 1437), and when lands had been flowed by a dam for a grist mill for 40 years the purchasers from the government were held to have had notice of such a prescriptive right, *Parkersville D. D. v. Wattier*, 48 Ore. 332, 86 Pac. 775.

Sec. 99. Proceedings—Practice—Conclusiveness of findings of board. As to the practice in Indiana in proceedings to establish a public drain, see, *Smith v. Gustin*, (Ind. 1907) 81 N. E. 722. The right of petitioners for the organization of a drainage district, under Ch. 54, St. 1898, to withdraw from the proceedings is discussed in, *In re Central Drainage Dist.*, (Wis. 1907) 113 N. W. 675. For a case concerning the jurisdiction of a court of equity to prevent reclamation proceedings under Pol. Code, § 3423, Pol. Code, tit. 8, c. 2, see *Glide v. Superior Court of Yolo*, 147 Cal. 21, 81 Pac. 225.

Parties. Where a party to a drain-opening proceeding died before final judgment and appeal, the appellant must make her devisees, assessed for the construction of the ditch, parties to the appeal in her place, *La Porte Land Co. v. Morrison*, 167 Ind. 73, 78 N. E. 321.

Conclusiveness of finding of board. A court of equity will not interfere with findings of a drainage commission where no fraud is shown and the only complaint is that they are erroneous and that one of the members has a personal interest in establishing the drain in question. Ch. 21, Rev. Codes 1899, construed, *State v. Fish*, (N. D. 1906) 107 N. W. 191. Under Code Civ. Proc., s. 1238, subd. 4, the decision of a board of trustees of a reclamation district created by an act of the legislature is final concerning the necessity for the drainage of a district, and in a proceeding to condemn the defendant's land the court only has jurisdiction to determine whether the land is necessary for the construction of the ditch, *Laguna D. D. v. Charles Martin Co.*, (Cal. 1907) 89 Pac. 993.

Sec. 100. Assessment statutes noted and construed.

Assessment statutes. Sec. 1424 of Kirby's Digest, providing for the assessment of lands benefitted by the improvement of drainage ditches, is amended by Ark. Acts of 1907, No. 111, sec. 4. Arkansas Statutes as to drainage assessments, construed, *Hale v. Moore*, 82 Ark. 75, 100 S. W. 742.

The Acts of Feb. 24, 1905, sec. 12, subd. 3, (Sess. Laws, 1905, p. 340) was construed to grant a municipality the right to levy sewer assessments depending on the number of front feet and the amount of benefit which the property would

derive, *Blackwell v. Village of Coeur D'Alene*, (Idaho 1907), 90 Pac. 353.

No assessment on village adjoining a drainage district, *Drainage Com'rs v. Cerro Gordo*, 217 Ill. 488, 75 N. E. 516. *Hurd's Ill. Rev. St.* 1903, c. 42, as to levy of assessments for drainage districts, construed, *Frank v. Rogers*, 220 Ill. 206, 77 N. E. 221. As to the practice in proceedings by a drainage district to have a special assessment confirmed under *Hurd's Illinois Rev. St.* 1905, c. 42, see *Iriquois Drainage Dist. v. Harroun*, 222 Ill. 489, 78 N. E. 780. *Hurd's Illinois Rev. St.* 1905, p. 775, c. 42, as to assessments by drainage districts to construct ditches, construed, *Commissioners, etc., v. Wright*, 228 Ill. 208, 81 N. E. 849.

Ch. 12, of title 5, of the Code extended to taxes levied for construction of sewers. Maximum tax for sewers prescribed, *Ia. Laws* 1906, Cl. 26, secs. 4 and 5. Code Sec. 1952, relative to assessments in drainage districts, construed, *Thompson v. Mitchell*, 133 Ia. 527, 110 N. W. 901.

Drainage districts are authorized to levy arrearage taxes, subject to vote of taxpayers by *Ia. Acts* 1906, No. 29. See further, *Ia. Acts* 1906, No. 95.

A petition for sale of land for sewer taxes will be denied if it appears that the land is already drained and that the only benefit from the new sewer, for the expense of which the taxes in question were levied, is surface drainage, *Auditor General v. O'Neill*, 143 Mich. 343, 106 N. W. 895.

The method of assessing property benefitted by construction of ditches is prescribed by *Minn. Laws* 1907, Ch. 246.

Taxes are authorized to be levied by the directors of levee districts and the manner of their collection prescribed by *Mo. Laws* 1907, p. 350, amending Ch. 134, sec. 8437, *Rev. Stat.* 1899. *Missouri Rev. St.* 1899, sections 8437 and following, as to assessment of lands in levee districts, construed, *State v. Three States Lumber Co.*, 198 Mo. 430, 95 S. W. 333.

The assessment of taxes by the supervisors of drainage districts is regulated by *Neb. Laws* 1907, Ch. 152, amending *C. A. S.* 5565, etc.

Assessments for benefits conferred by construction of sewers are regulated by *N. J. Laws* 1906, Ch. 44. The assessment of benefits of sewer construction is regulated by *N. J. Laws* 1906, Ch. 215, amending Act of April 7, 1890.

Assessments for benefits conferred by construction of sewers and drains are authorized by N. J. Laws 1906, Ch. 44.

The Ohio ditch law (Rev. St. 1906, section 4479) construed, *Cattell v. Putnam*, 73 Ohio St. 147, 76 N. E. 390.

The assessment of state, school and granted lands for drainage purposes is provided for by Wash. Laws 1907, Ch. 74 and 91.

Attacking assessments. Comp. Laws, sections 4344, 4345 and 4346, relative to review of drainage assessments, construed, *Clinton Tp. v. Teachout*, (Mich. 1907) 111 N. W. 1054. A landowner, damaged by the fraudulent acts of a drainage commissioner in establishing a drain, may have relief in equity from his assessment, *Hudlemyer v. Dickinson*, 143 Mich. 250, 106 N. W. 885. Under Pub. Acts 1899, No. 272, one aggrieved by assessments must proceed as provided and may not seek other relief at law or in equity, *Jones v. Gable*, (Mich. 1907) 113 N. W. 577. After materials for a drain have been supplied persons interested may not have an injunction against assessments because the materials were not bought of the lowest bidder, *Alstad v. Sim*, (N. D. 1906) 109 N. W. 66. An injunction will not issue to restrain the collection of assessments to pay for a drain, on the ground of informality in the work of construction, when the plaintiff had knowledge of all the proceedings and impliedly consented thereto, *Alstad v. Sim*, (N. D. 1906) 109 N. W. 66. Where in an action to enjoin the building of a drainage system it appeared that landowners assessed for betterments received no benefit but were in fact injured thereby the relief given them must be limited to restraining the assessments, not the public improvement itself and the bonding of the district, *Coffman v. St. Francis Drainage Dist.*, (Ark. 1907), 103 S. W. 179.

Notice. A drain was laid out by a drain commissioner under a statute containing no provisions as to notice to owners of land which might be assessed for betterment. Later on, when the question of assessment came up, notices were sent to owners of land to be assessed, but in several instances notice was given to only one of several co-tenants, or to the husband alone, where husband and wife were the owners. Held that the assessment was valid except as to the lands of the co-tenants and wives who were not notified, owners of land which may possibly be assessed having no constitutional right

to notice of the laying out of the drain, *Hinkley v. Bishop*, (Mich. 1908) 114 N. W. 676.

Sec. 101. Damages. The drainage act, Acts 30th Gen. Assem., c. 68, construed as to claims for damages, *Clary v. Woodbury County*, (Ia. 1907) 113 N. W. 330. As to remedies of owners of land damaged by drainage ditches constructed under Ch. 230, Laws 1905, see *Bilsborrow v. Pierce*, 101 Minn. 271, 112 N. W. 274. A township may recover damages from a drain commissioner who so enlarges artificial drains as to cause an increased flow of water and injury to highways, bridges and culverts, *Merritt Township v. Harp*, 141 Mich. 233, 104 N. W. 587.

Code, sec. 1947, relative to appeals from amount of damage in drainage proceedings, construed, *Henderson v. Calhoun County*, 129 Ia. 119, 105 N. W. 383.

When the water from the plaintiff's ditch overflowed the defendant's potato field and injured his potatoes, he could introduce as evidence the amount of the yield of adjoining farms which were uninjured to show the amount his fields would have yielded if they had not been flooded, *Dennis v. Crocker-Huffman Land & Water Co.*, (Cal. 1907) 91 Pac. 425.

Benefits offset. "When an action is brought to recover damages occasioned by the construction of a drainage ditch, and it appears that the special benefits received by any particular tract of land exceed that portion of the cost of the ditch apportioned to it, the special benefits in excess of the cost may be offset against consequential damages," *Gutschon v. Washington County*, (Neb. 1906) 107 N. W. 127.

Sec. 102. Rights of upper and lower proprietors inter se. At common law and by Ch. 70, Acts 1904, a lower landowner may collect surface water in drains so that the result of the accelerated flow will be the formation of gullies on land above him—and the upper owner may have no relief, *Pohlman v. Chicago, M. & St. P. Ry. Co.*, 131 Ia. 89, 107 N. W. 1025. An agreement for the construction of a drainage ditch will justify the upper proprietor in draining his lands to a lower level than would be affected in a state of nature, *Neuhring v. Schmidt*, 130 Ia. 401, 106 N. W. 630.

Sec. 103. Levee contract. A and B owned two tracts

of swamp and they entered into a written agreement whereby each agreed to build a levee on his own land to connect with the levee to be built on the other's land. A did not complete his levee and B went on A's land and completed it for him as high as the engineer named in the contract provided, and B had a right to recover damages to the amount of the cost of completing A's levee, which was not excessive as he would have been entitled to heavier damages if the floods had damaged his land through the failure of A to build his levee. Since the action was brought within four years from the time of the breach B could recover, *Fabian v. Lammers*, 3 Cal. App. 109, 84 Pac. 432.

EASEMENTS

Effect of maps and plats showing ways, see *ante* §79.

Highways, see that title.

Railroad right of way, see RAILROADS.

Of support in mining operations, see *post* §359.

Equitable easements and restrictions, see *ante* §84.

Sec. 104. Creation. As to the servitudes of view and drip in Louisiana, see, *Bernos v. Canepa*, 114 La. 517, 38 S. 438. According to Civ. Code 1895, s. 4039, a mere parol agreement to grant a right of way without consideration will not be enforced, even if the plaintiff has spent large sums relying on this agreement when the expenditures were for his own benefit, *Swan Oil Co. v. Linder*, 123 Ga. 550, 51 S. E. 622. The right of a person to take ice from a pond is an easement in gross or a profit a prendre, which constitutes an interest in real estate for injury to which by a taking under eminent domain suit must be brought within two years under the Massachusetts Statutes, *Carville v. Commonwealth*, 192 Mass. 570, 78 N. E. 735.

Wall for advertising. When for a valuable consideration the owner of a building signed a written agreement in the form of a lease of the "entire west wall.....for advertising purposes" for one year a right in the nature of an easement was created rather than a mere revocable license, *Levy v. Louisville Gunning System*, (Ky. 1905) 89 S. W. 528.

Use of stairs. Where a judgment by consent was entered granting the use of a basement hall and stairs, it did not give any right to demand changes in the building so that more light should come from the windows on the stairs, *Massey v. Barbee*, 138 N. C. 84, 50 S. E. 567. Where a deed granted "a perpetual right and privilege to use in common with the party of the first part the stairway now running up between" two houses "for all necessary purposes," it did not grant an undivided half interest but only an easement, although there was a warranty clause, and a provision that the expense of repair should be equally divided, *Bale v. Todd*, 123 Ga. 99, 50 S. E. 990. A reservation in a deed of half a building, of "the right to use the stairway and hall upstairs," where tenants of the other half used the stairway to the street, was held to include the stairways leading to both hall and street in *Teachout v. Capital Lodge*, 128 Ia. 380, 104 N. W. 440.

Right to lay pipes. Where a deed grants for a valuable consideration a right to lay pipes to convey petroleum within ten feet of the grantor's line and two pipes are laid, a third pipe line may also be laid under the grant of the right of way, *Standard Oil Co. v. Buchi*, (N. J. Ch. 1907) 66 Atl. 427. A grant of a right of way for "any water pipes which may be laid by the city" which are to be covered by not less than one and one-half feet of ground and to be "laid or maintained on or near the present line of survey as near as may be," was a general grant which could be limited by an election of the city to lay only one pipe and the city had no right to lay another pipe a number of years later without additional compensation to the owner of the land, *Winslow v. City of Vallejo*, 148 Cal. 723, 84 Pac. 191. A deed conveying to a city the right to "enter upon a strip of land fifteen feet wide, for the purpose of laying one or more water pipes for conveying water from Fresh Pond to the city reservoirs on said street, and of examining, repairing and relaying the same whenever necessary" gave the city an easement limited to the use of the land for pipes to supply the reservoir and after the destruction of the reservoir the city could not use the land for pipes in connection with its general water system. But the easement granted included the right to supply with water a standpipe later built on top of and as a part of the reservoir and would also cover the supply of a new reservoir erected on the site of the old one. The

city, however, could not by prescription acquire greater rights without proof that the owner of the land had actual or constructive knowledge of the acts claimed to establish such rights, *Gray v. Cambridge*, 189 Mass. 405, 76 N. E. 195.

Spring. When a deed of land contained the following clause: "The party of the second part is hereby granted the privilege of free access and use of the water of a certain mineral spring near by for the use and benefit of his house," it was held that, although the granting clause was silent as to the spring, the deed conveyed an easement in the spring, with the right of access thereto, *Rittenhouse v. Swango*, (Ky. 1906) 97 S. W. 743.

What covered by. If a special verdict is so indefinite that it does not determine the particular portion of the property which is subject to an easement for a right of way for railroad purposes, it may be set aside, *Nicholson v. Maine Cent. R. Co.*, 100 Me. 342, 61 Atl. 834. A deed conveying "a perpetual easement for the purposes of a public levee or street only, over and upon lot numbered 2 in block A, and lots 3, 4 and 5 in block C.....and also lots numbered 5 and 6 in block 2".....will be construed, in view of the surrounding circumstances, as granting an easement over lots 5 and 6 in block 2 as well as over the lots previously mentioned, *Lamton v. Joesting*, 96 Minn. 163, 104 N. W. 830. Where the plaintiff's ancestor bought a passageway by giving a check for \$200 "for passway" after which he and the plaintiff's used it continuously for 11 years, the possession identified the passway. Purchasers from the giver of the passway who bought with notice that the plaintiffs had been using it for years are chargeable with notice of the latter's right, *Jones v. Jones*, 31 Ky. Law Rep. 183, 101 S. W. 980. Where the plaintiff bought a "sand hill" or "sand pit" of the defendant, he acquired only an easement to remove sand, although the boundaries were marked by the defendant by three iron pins. The defendant's heirs were obliged to make a conveyance to the plaintiff of the easements sold, although the sale was by parol and the plaintiff had taken out sand under no other agreement for a number of years, *Brandon v. West*, 28 Nev. 500, 83 Pac. 327.

Sec. 105. By prescription.

Adverse possession, see that title.

The right by prescription to conduct water through a culvert under the surface of a highway, when so maintained as to impose no hindrance, inconvenience, or expense upon the public, may be acquired against the owner of the fee of the land underlying the highway by 20 years adverse and uninterrupted use, *Terre Haute & I. R. Co. v. Zehner*, 166 Ind. 149, 76 N. E. 169. Under Code, sec. 3004, evidence that the use of a right of way over the land of another was under a claim of right is necessary in order to establish it, *McBride v. Bair*, (Ia. 1907) 112 N. W. 169. A private way over the land of another may be acquired by adverse user in the same time that the public may acquire the right to a public way by adverse use. In either case the use must be open, continuous and adverse under a claim of right for the full period of the statute of limitations which in Arkansas is seven years, *Clay v. Penzel*, 79 Ark. 5, 94 S. W. 705. When an alley between two town blocks, laid partly on each, was a matter of convenience and necessity to both owners, and had been used for over 10 years openly, continuously, peacefully, and adversely as an alley, each acquired an easement thereon, entitling them to have it remain open, *Scott v. Dishough*, (Ark. 1907) 103 S. W. 1153. Where one has acquired a prescriptive right of way, the right presumably passes with the land to which it is appurtenant; and in an action by the holder of the land, under a deed from the prescriber, to require the removal of obstacles erected in the way, it is not necessary to allege that the way was laid out by the petitioner, or that the defendant had knowledge that the way was laid out, used and enjoyed, *Nugent v. Watkins*, 124 Ga. 150, 52 S. E. 158.

Presumptions. When the owners of a house situated about 1,000 yards from the turnpike had been using a road across the intervening farm from the house to the turnpike for about 50 years a right to use by prescription is presumed, *Smoot v. Wainscott*, (Ky. 1905) 89 S. W. 176. The continuous use for 15 years of a way over another's land as a matter of right creates a presumption in favor of a grant which the owner has the burden of disproving by showing the use was merely permissive, *Bryars v. Rash*, (Ky. 1907) 100 S. W. 306. Where a passage way has been used by neighbors for many years very slight evidence is sufficient to show that it has been used under a claim of right instead of permissively and the burden is on the owner who attempts to

close it, *Smith v. Pennington*, (Ky. 1906) 91 S. W. 730. The use of a passway for many years creates the presumption of a grant, and the burden is on the landowner to show that the use was merely permissive. A purchaser is charged with notice of the obvious fact that there is a passway, *Sparks v. Rogers*, (Ky. 1906) 97 S. W. 11. When the owners of a house and lot for twenty-five years used water from a sulphur well on adjoining premises as a matter of right with the knowledge of the owners of the well and without let or hindrance, they *prima facie* acquired an easement, and the burden is thrown on those disputing it to show that the use was permissive rather than adverse, *McPherson v. Thompson*, (Ky. 1905) 89 S. W. 195. When a passway has been used for a long period of years very slight evidence will be sufficient to show that it was enjoyed under a claim of right, and when the proprietor undertakes to close a passway, the burden is on him to show that the use was merely permissive, and to explain away the presumption that its uninterrupted enjoyment for more than 15 years was not exercised under a claim of right. The mere fact that the owner of the servient estate never gave, and the persons using the passway never asked, permission, is not in itself sufficient to overcome the presumption in their favor arising from the long-continued use of this way, *Schwer v. Martin*, (Ky. 1906) 97 S. W. 12.

Inception by license or agreement. The user for the statutory period of an easement creates a prescriptive right thereto although there was originally an actual oral grant of the easement which was void by the statute of frauds, *Settle v. Cox*, (Ky. 1905) 89 S. W. 534. An easement by prescription is obtained by several owners who agree orally with one another to contribute a strip from each of their adjoining lots for a right of way, *Jensen v. Showalter*, (Neb. 1907) 113 N. W. 202. The builder of a mill arranged with an occupant of land to allow a canal carrying water to cross the land, and a verbal grant was made to the mill owner of the easement, which was void on account of the statute of frauds, but when the canal had been in use for over 25 years a right to the easement was acquired by adverse use, *Lechman v. Mills*, (Wash. 1907) 91 Pac. 11. Where the right to use water from a spring on the plaintiff's land had been surrendered by a deed, a subsequent use by the grantor of the

deed while a tenant of the plaintiff was insufficient to start the operation of the statute of limitations, and a title of adverse possession could not be acquired by the defendant holding under a deed from the tenant when the evidence showed that he had not occupied the property for seven years, *Gill v. Mahan*, 29 Utah 431, 82 Pac. 471. When the owner agreed in writing to allow another to build a newspaper office on his land and hold possession thereof as long as he used it for that purpose, the latter acquired the exclusive use of the property, terminable only upon his death or ceasing to publish the newspaper. One who claimed under the original owner of the newspaper and occupied the premises for the same purposes for twenty years and spent large sums thereon in improvement thereby acquired an easement by the statute of limitations to continue to so use it, *Frederic v. Mayers*, (Miss. 1907) 43 S. 677. In 1859 B, the owner of a farm which passed to the defendant, obtained from plaintiff's predecessor in title, in order to reach a highway, written permission for a right of way over his land. In 1876 the owner of the servient estate died. A new highway, passing B's land, was constructed soon afterward, but the private way was used continuously until 1895, when plaintiff built a fence across it. This fence remained until 1903. This action of trespass was brought because of the tearing down of the fence. *Held*—The written permission amounted to a personal license, which was revoked by the death of the grantor in 1876. Between 1876 and 1895 the use was adverse and thereby the defendant's grantor acquired a right of way by prescription which was not defeated by the occupation of the land by the plaintiff, *Toney v. Knapp*, 142 Mich. 652, 106 N. W. 552.

No easement created. Evidence examined and held to show that no right of way was created by adverse user, *Roberts v. Williams*, (Ky. 1906) 90 S. W. 565. Mere delay short of the statute of limitations upon the part of an owner upon whose land telephone poles and wires have been placed without his consent does not deprive him of the right to an injunction against their further maintenance, *Burrall v. Am. Tel. & Tel. Co.*, 224 Ill. 266, 79 N. E. 705. Where the defendant more than 10 years ago closed both the drains across his land, only one of which ran through the plaintiff's land, and three years before suit was brought cut the dam across the drain to the plaintiff's land the latter's action for dam-

ages imposed by the additional servitude was not barred by prescription, *Savoie v. Guillory*, 118 La. 455, 43 S. 49. In an action to enjoin a town from opening an alley through the plaintiff's land the evidence was examined and held to show that the alley was originally dedicated to the public and that the plaintiff had never, by adverse possession, deprived the public of its rights, *Town of Hope v. Shiver*, 77 Ark. 177, 90 S. W. 1003.

Disability. Where an elevated railroad was built in 1879 and an abutting owner died intestate in 1888 leaving as her only heirs infant children who did not come of age until 1898 and 1900, respectively, an action by them begun in 1902 for damages to their easement of light and air was barred by 20 years adverse use under the New York Code. The rule that the statute of limitations having once begun to run will not be suspended by supervening disability applies by analogy to the acquirement of an easement under the common law presumption of a grant by 20 years adverse user, *Scallon v. Manhattan Ry. Co.*, 185 N. Y. 359, 78 N. E. 284.

Sec. 106. Grants of rights of way—To telephone companies. An owner of a right of way agreed to accept another right of way in place of it, but he was not required to use the new alleyway for a period of time necessary to give him title by prescription as his right attached to it at once, *Thompson v. Madsen*, 29 Utah 326, 81 Pac. 160. Where an agreement for a private way through the land of adjoining owners is signed by all but one of them, and in order to obtain his signature, one who had signed changed materially the route of the proposed road through the land of the party not signing, no effect was produced as to one who had signed the agreement but neither consented nor knew of the change, *Hershman v. Stafford*, 58 W. Va. 459, 52 S. E. 533.

A telephone company was granted a right of way "over and along" the grantor's property with the right to trim trees and locate poles on the highway; but this grant did not allow the telephone company to construct its line diagonally across the land, *Zimmerman v. Am. Tel. & Tel. Co.*, 71 S. C. 528, 51 S. E. 243. An action for punitive damages may be brought against a telephone company when it builds a telephone line through the plaintiff's timber land, cutting a swath about 18 feet wide and also damaging the sown wheat, when it only

had a right of way along the road on plaintiff's land with the right to trim trees for 18 inches from the wires. The line as constructed was diagonally through the plaintiff's land. *Phillips v. Am. Tel. & Tel. Co.*, 71 S. C. 571, 51 S. E. 247. If a permit is granted to enter land and construct a telegraph line by one who has no interest in the land, it is not binding, although she later becomes a co-tenant, *Duke v. Postal Telegraph Cable Co.*, 71 S. C. 95, 50 S. E. 675.

Sec. 107. By reservation—Light and air—View.

Reservation of right to use stairs, see *ante* §104. Where a reservation of a right of way is intended by the grantors to be limited to the immediate grantors and grantee a stranger cannot acquire the easement, where his property fronts on a public street, and all the land to which the easement applied has come into the hands of one party, *Brace v. Van Eps*, (S. D. 1906) 109 N. W. 147. Words of reservation in certain deeds were as follows: "Saving and reserving to said parties of the first part [plaintiffs] their heirs and assigns, in common with the owners of said above-described lot [4], their heirs and assigns, and in common with the present owners of the east half of lot 12 and of the west half of lot 14.....an easement and right of ingress and egress from Fourth Street over.....said lot 4." *Held*—these terms showed that the use of the way was restricted to the properties described in the deed and that other parties, including the defendant, who owned lot 5, adjoining lot 4, were excluded, *Boogren v. St. Paul City Ry. Co.*, 97 Minn. 51, 106 N. W. 104.

Light and air. As to the servitude of view in Louisiana, see *Bernos v. Canepa*, 114 La. 517, 38 S. 438. The easements in the public streets of light, air, and access cannot be severed from the title to the adjacent property to which these easements are appurtenant, though they may be released to the parties trespassing thereon. Therefore a grantor cannot on parting with the lands reserve to himself those easements. He may, however, reserve the damages that his grantee may collect for the invasion of these easements, and as to such damages the grantee becomes a trustee for the grantor, *Schomacker v. Michaels*, 189 N. Y. 61, 81 N. E. 555. A built a house on lot 1 with windows opening on lot 2 which he also owned. Then he sold lot 1 with the building to B with a party wall agreement respecting the wall between

lots 1 and 2. A afterwards sold lot 2 to C who erected a building on it, and, claiming to be annoyed by the tenants in the apartments of the building on lot 1 throwing things down on the roof of his one-story structure, he threatened to wall up with a thin wall the windows in the apartment house, building a wall in each window on his own half of the party wall; but he was enjoined from interfering with the plaintiff's easement to the use of light and air, although he had a right to close the windows and use the wall as a party wall if he increased the height of his building, *Lengyel v. Meyer*, 70 N. J. Eq. 501, 62 Atl. 548.

Sec. 108. Of necessity. The right of an individual to demand a right of way of necessity gives a town no right to claim it as a public way, *Como v. Pointer*, 87 Miss. 712, 40 S. 260. Kirby's Arkansas Digest, section 3010, providing for the laying out of a private road over the lands of another when necessary to connect with a public road, construed, *Pippin v. May*, 78 Ark. 18, 93 S. W. 64. Where land taken consisted of a mill pond the judge properly instructed the jury that if it should be filled and divided into building lots, in separate ownership, between a certain boulevard and other parts of the pond, the owners of such lots would have a right of access from their lots to the boulevard, *Whitney v. Commonwealth*, 190 Mass. 531, 77 N. E. 516. Although Code Pub. Gen. Laws, art. 25, 100-121, grants an owner of land enclosed on all sides by land owned by other parties the right to obtain a private road from his land to get to the market, etc., on application to the county commissioners and payment of the cost of the road, it is unconstitutional as a taking of private property for a private purpose and, therefore, void, Const. art 3, s. 40 and the Declaration of Rights, art. 23. A road open to the public could be established under the provisions of the statute for public roads, *Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 413. Where B cut up into house lots a certain piece of land, sold them, and the owners of certain of the lots desired to have an alleyway for use in common, and a deed was made whereby each owner conveyed to the others in consideration of the privilege and easements granted each to the other, with general warranty, a certain strip of land for the use as a private way or easement by the said parties, their heirs and assigns forever, it was found that

prior to the making of said deed, the owner of two of the lots had conveyed their said lots to a trustee as security for a loan. After foreclosure and sale of one of the lots, without regard to the said alley, to one who sold and conveyed to B, the purchase of the outstanding title to the strip lying alongside of the five foot strip conveyed by B. with general warranty must inure to the benefit of his grantees and their successors in the title because that strip was absolutely necessary to the use and enjoyment of the easement, they being liable, however, to B for their several proportionate shares of the amount paid by B for said strip of lot purchased by him, *Flat Top Grocery Co. v. Bailey*, (W. Va. 1907), 57 S. E. 302.

Sec. 109. Lateral support. Sec. 291 Rev. Civ. Code regulating the rights of adjoining owners to lateral support, construed, *Hannicker v. Lepper*, (S. D. 1906) 107 N. W. 202. The right to lateral support for land in its natural condition is an absolute right, but there can be no recovery of damages to artificial structures erected thereon except upon the basis of negligence. Where excavations are continued after suit is brought the trial court may in its discretion allow the filing of a supplemental complaint for damages resulting therefrom. The court also quotes with approval the following: "The actionable wrong is not the excavation, but the act of allowing the other's land to fall," *Schmoe v. Cotton*, 167 Ind. 364, 79 N. E. 184.

Sec. 110. Use of easements—Extent of rights in—Removal of obstructions—Damage.

Where two tenants in common of land on which there were two houses partitioned it by a deed giving each one a house, the boundary being an alley between them which was to be kept open for the use and benefit of the owners of the lots, forever, a drain and stairway on the dividing line not being mentioned, no cross easement was implied giving each the right to have that part of the drain and stairway on the other's land maintained. The alley, however, could not be used for any other purpose, *Gaynor v. Bauer*, 144 Ala. 448, 39 S. 749.

Limits of way. A deed of land with "the right of passage to and from over a strip of land sufficiently wide for all

purposes of travel, with team or on foot, lying along the westerly side of the land above described, the same to be used in common with the grantor and those claiming under him for the purpose of entering upon the rear part of the lot above described, "did not create an easement over the land conveyed for the benefit of the remaining land of the grantor, but merely the limits within which a way was to be laid out wholly on the grantor's land. As the boundaries are left uncertain, they are to be determined by the resort to the purpose for which it was granted and the acts of those having the right of user. An injunction was issued to restrain repeated, though comparatively harmless, trespasses over such way as was actually laid out, *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700.

Projection over alley. Where an owner of a lot of land abutting on an alleyway whose deeds do not mention the alleyway as a boundary erects a fire escape from a theatre built on the land over the alleyway, he may be enjoined by an owner of another lot opposite who has in his deed a grant of the privilege to use said alley, as the building of the fire escape is an additional servitude on the right of the other property owner to use the alley. The fact that the defendant owned another lot which possessed the right to use the alley did not give such a right for the lot on which the theatre was. Although the plaintiff merely held a lease for 999 years, his title was sufficient to maintain the suit, *Schmoele v. Betz*, 212 Pa. 32, 61 Atl. 525.

View obstructed. The erection of some columns extending about 2 feet beyond the building line of the lot next the complainant's constituted such an obstruction of the latter's easement of view along the street as entitled him to an injunction, *First Nat. Bank of M. v. Tyson*, 144 Ala. 457, 39 S. 60.

Use of court. Where the owner of adjacent lots on which there were a hotel, theatre and covered court between the two, the rooms over the court and in the theatre lobby and theatre building being used as a part of the hotel, and doorways opened from the court into the hotel and basement and the court was also used as an exit, leased the hotel the description in the lease being as follows: "Buildings numbered 625 to 631, inclusive, together with the basement under said promises, meaning thereby the entire build-

ings containing stores and all floors over said stores, meaning thereby all the real estate I now own on W. street, excepting the building known as the Park Theatre" the lessee could only use the court as an appurtenance of the hotel, *Crabtree v. Miller*, 194 Mass. 123, 80 N. E. 225.

The plaintiff held an easement to the "common use and privilege of a 20 foot wide court, with or without horses, carriages and cattle," and he brought an action to compel the removal of the defendant from the occupation of a subsurface vault, substantially covered on the grade of the court with heavy flag-stones and substantial concrete work, but the court held that it was not an interference with the use of the court as flag-stones made a very fine paving. Doors to the theatre which projected beyond the line of the court and remained projecting into the court, some as much as 3 ft. 4 inches, when they were opened, as well as shutters which could not be closed back against the building when opened, were ordered removed, and a fire escape which was 10 ft. 6 inches above the court was also ordered removed as it projected over the court, *Mershon v. Walker*, 215 Pa. 41, 64 Atl. 403.

Change of use not allowed. Where a flume was built in 1865 and since maintained across the plaintiff's land, the defendant had no right to construct a ditch in 1900 from one to twenty feet distant from the line of the flume and use that for conveying his water instead of the flume which was abandoned, as it imposed a different servitude on the land, *Vestal v. Young*, 147 Cal. 715, 82 Pac. 381. If there was no apparent reason for a change in the location of an outhouse in which the plaintiff had an easement with the defendant, a court of equity will enjoin any change, when the right of the plaintiff is clear, and it will order the removal of the building to its former situation when the change was a distinct injury to the plaintiff, *Piro v. Shipley*, 211 Pa. 36, 60 Atl. 325. A deed purporting to convey "the right of way" over certain land "for the purpose of constructing and maintaining any and all levees that may be built thereupon as a protection against overflow" gave only one right of way, and when that was selected and occupied by a levee in order to build a new levee on a different line across the land a new right of way must be acquired, *Board of Directors v. Bowen*, 80 Ark. 80, 95 S. W. 993. "An easement of a right of way through another's property does not mean a changeable route at the

pleasure of the owner of the dominant estate, but implies, when it is not specifically described, that one definite route is to be selected and thereafter used; and when so selected, there remains no right to pass over any other part of the tract embracing the servient estate, *Chesapeake & O. Ry. Co. v. Richardson*, (Ky. 1907) 98 S. W. 1042.

Right to build tramway. When a deed of mineral rights provided that the grantee, an asphalt company "shall have free access to said land from any direction by roads and other passways or means of exit or entrance" the grantee can build a tramway because it was in fact necessary to facilitate the increased output of the mine, *Duncan v. Am. Standard Asphalt Co.* (Ky. 1906) 97 S. W. 392.

Easement runs with land. Removal of obstruction. A buyer of an estate charged with an easement which is known to him or can be discovered upon examination takes subject thereto and if he obstructs it by locked gates the dominant tenant may remove them, doing no needless damage, *Schmidt v. Brown*, 226 Ill. 590, 80 N. E. 1071. A conveyed by deed a lot of land to B "also a free right of way for an alleyway 12 feet wide extending from the rear end of said lot" across other land owned by A. After this deed had been recorded A conveyed the lot over which the right of way passed to C, and later C conveyed to D who occasionally placed a fence across the right of way and then later built a gate there notwithstanding due notice of the rights of B. Such obstructions were in violation of the rights of B as governed by his deed, *Flaherty v. Fleming*, 58 W. Va. 669, 58 S. E. 857.

Sale. When an easement was granted by the mortgagor across the land without referring to the mortgage a court had jurisdiction to order a sale subject to the easement on foreclosure and when a sufficient sum to satisfy the mortgage was not realized the court could order a sale of the easement, *Wykes v. City of Caldwell*, 71 Kan. 459, 80 Pac. 941. The Champerty Statute not being applicable, the owner of a lot with an easement appurtenant thereto may sell and convey a good title to both, although the easement is in the adverse possession of another, *Williams v. Poole*, 31 Ky. Law. Rep. 757, 103 S. W. 336.

Damages. Where a deed contained a promise that "a passageway is to be kept open and for use in common between the two houses ten feet in width, five feet of said

passageway to be furnished by "the grantee" and "five feet by the grantor" from land lying east of the land here conveyed. To have and to hold. . . . to the "grantee" his heirs and assigns, to their use and behoof forever," it was held that a contract was created which the dominant tenement could enforce against subsequent grantees of the servient tenement taking with notice. The damages caused by such an easement in a suit upon a covenant against incumbrances are an amount which will justly compensate the plaintiff for the real injury at the date of the deed containing the covenant against incumbrances, *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 76 N. E. 449. A water company which, in violation of a contract previously made with a majority of the landowners of a certain tract to keep open a right of way acquired by it through the land for its water main, obstructed the way by the erection of a permanent standpipe and house, was not required to remove the structures but to pay the grantors of the land the difference between the value of the land with the way closed and its value were it open, *Bell v. Louisville Water Co.*, (Ky. 1906) 96 S. W. 572.

Sec. 111. Abandonment—Extinguishment or estoppel.

The award by private arbitration to an adjoining owner of the right "to make and construct a levee" was a mere license to build one which was terminated by the subsequent destruction of the levee actually built, *Pinkstaff v. Steffy*, 216 Ill. 406, 75 N. E. 163. The plaintiffs owned lots on a plan the streets of which, although not opened, had been dedicated more than 50 years, and they brought suit to compel the removal of the railroad from an unopened dedicated street which had subsequently been vacated by the city, but they were unable to compel such removal when there was a suit pending to oust the railroad from part of this street which was dropped by the plaintiff's predecessors in title at the time they granted a right of way to the railroad, showing that the consideration paid for the right of way included compensation for the loss of a private easement in the street, although the deed to the railroad vaguely bounded the right of way by the street which was considered a public street at that time by both parties, *Young v. Penn Ry. Co.*, 72 N. J. Law 94, 62 Atl. 529. Where the complainant, who had a right in common with the defendant to use a strip of land lying between them as a private

way, for more than 20 years used it as a means of ingress and egress to and from their buildings and as a place to temporarily leave wagons, lumber, and other property used in their business, such user was not adverse and did not bar the defendant's easement therein, *Hofherr v. Mede*, 226 Ill. 320, 80 N. E. 893.

Abandonment. Although mere non-user of an easement for more than 20 years does not conclusively show abandonment, if it be accompanied by an adverse use of the servient estate inconsistent with the existence of the easement it will be extinguished, *Canton Co. v. Mayor, etc., Baltimore*, (Md. 1907), 67 Atl. 274.

The erection of a building in a street west of certain premises and a fence closing the street the result of which was to inclose the northwesterly half of the street abutting on a small part of such premises, leaving free from obstruction the way from the land west to a certain street, did not conclusively show an intention on the part of the owner to abandon the way over the westerly part of the street the use of which was continued by the person who built the building and his successors in title, *New England Structural Co. v. Everett Distilling Co.*, 189 Mass. 145, 75 N. E. 85. In 1873 and 1877 an easement of a right of way over certain premises conveyed to defendant was reserved. This right was partially but not completely interrupted from time to time until 1896 when a building cut it off entirely. In 1898 this was destroyed by fire and no further interruption occurred until three years before trial. *Held*—no loss of right of way by adverse possession, *Reed v. Gasser*, 130 Ia. 87, 106 N. W. 383.

Estoppel. A purchaser bought two lots to get an outlet through a private way to a public highway, but where the plan of the land showing the private way was not filed or recorded, the purchaser obtained at most a private right of way, when the road ended in a cul-de-sac. His agent had notice that it was proposed to close the part of the road beyond his lots and nearer the closed end, and that releases were being circulated, and when it was not shown that any possible injury could come to the purchaser by the closing of said part of the road he was estopped from objecting, *Stevens v. Headley*, 69 N. J. Eq. 533, 62 Atl. 887.

Sec. 112. Appurtenant or implied easement—Reference to plan—Building in part on land of another. The devise of a house and lot does not carry with it an easement in an adjoining strip of land used by the testator as a doorway and acquired by him by adverse possession, *Miller v. Hoeschler*, 126 Wis. 263, 105 N. W. 790. When the owners of land opened up an alleyway for their own convenience it remained upon the cutting up of the property by sales to various parties as an appurtenance to the land of all who abutted thereon, *Cook v. Burton*, (Ky. 1906) 92 S. W. 322. A stairway leading from a sidewalk to a second story landing and necessary to the proper enjoyment of the estate which, after a use for 20 years, has been removed by the city, will still pass as appurtenant to the estate, though the deed contains no reference to appurtenances, *Agnew v. Pawnee City*, (Neb. 1907) 113 N. W. 236. A partition deed of land on which there was a mill and dam which contained the following clause: "The privilege and liberty to get gravel from the west side of the mill dam to keep the same in repair, is also granted in this deed to the possessor of the mill" passed a profit a prendre which is treated like an easement as appurtenant to the land conveyed, *Hopper v. Herring*, (N. J. Law. 1907) 67 Atl. 714. A sewer drain ran through the defendant's land of which no special mention was made in the deed, but with the usual clause—"ways, waters, profits, privileges and advantages with the appurtenances," etc. The defendants were prohibited from interfering with the sewer by making a connection to it of their own sewer in such an improper manner that the plaintiff's sewer was obstructed, *Hess v. Kenney*, 69 N. J. Eq. 138, 61 Atl. 464.

Reference to plan. Where land outside of a town is divided into blocks, lots, streets and alleys and lots are sold with reference to a plot thereof recorded in the County Clerk's office, a purchaser of a lot takes an easement in all the streets and alleys on the plot, *Williams v. Poole*, 31 Ky. Law Rep. 757, 103 S. W. 336. Where on a plat, dotted lines are used as a continuation of the lot lines, crossing the space at the rear of the lots marked "Private Alley" purchasers of lots took the space between the dotted lines in fee subject to an easement in favor of the other lot owners, *City of Chicago v. Hogberg*, 217 Ill. 180, 75 N. E. 542. Where the owner of land on the corner of two streets divided it into four lots,

three facing one street and the fourth facing the other, and then sold 1, 2 and 3 separately to different persons, at a time when a passageway was apparent, running from lots 2 and 3 across the rear of 1 to the street, the purchasers took an easement therein. The later erection of gates across the easement which did not interfere with its use for the purposes intended did not extinguish the easement, *Martin v. Murphy*, 221 Ill. 632, 77 N. E. 1126. Where a recorded plan showed land platted into lots and streets and connected with a city street by a bridge to be erected by the owner, who had mentioned the bridge to purchasers and in the deeds of lots sold; the conveyance of lots implied a grant of the bridge as an easement. *Oney v. West Buena Vista Land Co.*, 104 Va. 580, 52 S. E. 343. When sales of land have been made according to a certain plan with a number of streets and alleys plotted thereon, the purchaser of any lot on the plan as well as the purchasers on a particular street, have a right to the use of the street and they have a right to force the opening of all the streets and alleys plotted on the plan for their use, *Edwards v. Moundville Land Co.*, 56 W. Va. 43, 48 S. E. 754.

Building in part on land of another. The mortgagee of land and buildings acquires by foreclosure only an easement in an adjoining strip of land on which one wall of the buildings was accidentally constructed, *Carrigg v. Mechanics' Savings Bank of Prov., R. I.*, (Ia. 1907) 111 N. W. 329. "When the owner of premises has constructed a permanent building, so that most of it is on one tract of land and a part on the second tract and sells the first tract, his vendee has an implied easement on the second tract to the extent necessary to support the building;" but the purchaser of the second tract, without knowledge of the easement, takes it free from it, *Smith v. Lockwood*, 100 Minn. 221, 110 N. W. 980.

EJECTMENT

See further, ACTIONS, FORCIBLE ENTRY AND DETAINER.

Sec. 113. When proper—Parties—Tenants in common. During the pendency of an appeal by the vendor in an action by a vendee in possession to recover damages for failure of vendor to execute the deed, the vendor will not be

permitted to bring an action for possession, *Gray v. Nolde*, (Neb. 1906) 107 N. W. 224. Ejectment is the proper remedy for one of two adjoining proprietors if the division fence occupies a disproportionate part of his land, *Rose v. Linderman*, 147 Mich. 372, 110 N. W. 939. Ejectment is the proper action when one who conveys his property on condition that the grantee support him for life desires to have it restored because of breach of the condition, *Mash v. Bloom*, 130 Wis. 366, 110 N. W. 203. Ejectment is a proper form of action when a person is fraudulently deprived of his property and evidence to establish his rights must be produced aliunde the record, *Steinberg v. Saltzman*, 130 Wis. 419, 110 N. W. 198.

Where a telephone wire is stretched across the plaintiff's premises but the soil is not touched ejectment will lie. The case contains a very interesting discussion, *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716. Where an adverse claimant enters upon land of an owner in actual possession the owner may maintain ejectment, *Logan's Heirs v. Ward*, 58 W. Va. 366, 52 S. E. 398. Ejectment is the proper process for a mother who desires to recover possession from her daughter and son-in-law who have entered pending negotiations for purchase in consideration of the care of the mother, *Maxham v. Stewart*, (Wis. 1907) 113 N. W. 972.

Parties. Alabama Code 1896, section 1534, which provides that a landlord may be made a party to an action of ejectment against a tenant upon the latter's motion, construed, *Dake v. Sewell*, 145 Ala. 581, 39 S. 819. The equitable owners cannot recover in ejectment where the person in actual possession is not made a party, *Houghton v. Pierce*, 203 Mo. 723, 102 S. W. 553. Under Rev. St. 1889, §§ 3056 and 5435, a wife need not be a party to ejectment by a party claiming as purchaser at a sale under a deed of trust, *Bouton v. Pippin*, 192 Mo. 469, 91 S. W. 149. Missouri Rev. St. 1899, s. 3056, which provides that an action of ejectment shall be prosecuted against the person in possession of the premises, sustained, *Llewellyn v. Llewellyn*, 201 Mo. 303, 100 S. W. 40. Missouri Rev. St. 1899, section 3056, and following providing that ejectment shall be brought against the person in possession, construed. Different tenants occupying separate portions of premises must be sued separately. *Hunter v. Wethington*, 205 Mo. 284, 103 S. W. 543. Hurd's Illinois Rev. St. 1905, p. 45, the Ejectment Act, as applicable to the joinder of

parties claiming an interest, construed, *Glos v. Swanson*, 227 Ill. 179, 81 N. E. 386. In an action of ejectment, before the trial the plaintiffs conveyed the land in question by deed in fee simple to another who in turn conveyed to another who was a married woman and neither were made parties in the suit. Under Revisal 1905, section 400, action must be brought in the name of "the real party in interest" and section 414, "When a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in," it was error to find a verdict for the plaintiffs, as section 415 does not have the effect of permitting the original plaintiff in ejectment to recover after conveying his interest, without either joining his grantee as a party or substituting him as a party, *Burnett v. Lyman*, 141 N. C. 500, 94 S. E. 412.

Tenants in common. One tenant in common can sue alone in ejectment, *Henry v. Frohbihstein*, (Ala. 1907) 43 S. 126. While the common-law rule that tenants in common shall not join in an action of ejectment has been modified in Tennessee, it has been the established practice to confine the recovery of a tenant in common both in right and possession to his undivided interest in the property in controversy, and the sections of the code regulating actions of ejectment in no way affects this practice, *Williams v. Coal Creek Min. Co.*, (Tenn. 1906) 93 S. W. 572.

Sec. 114. Title necessary to maintain—Proof of title—Burden of proof. In ejectment the plaintiff must recover upon the strength of his own title not upon the weakness of the defendant's, *Carpenter v. Jones*, 76 Ark. 163, 88 S. W. 871. Where the defendants in ejectment are in possession the plaintiffs cannot recover unless they show title in themselves or prior actual possession and ouster, *Winn v. Coggins*, (Fla. 1907) 42 S. 897. In ejectment a plaintiff not making out a *prima facie* title in himself cannot set up that the defendant is a mere trespasser or is equitably estopped, *De Land v. Dixon P. & L. Co.*, 225 Ill. 212, 80 N. E. 125. Where the plaintiff has a title acquired as purchaser under a sale on execution of a judgment against the owner of land divided after a suit for partition, he has a sufficient title to maintain ejectment proceedings, *Richardson v. Wymer*, 104 Va. 236, 51 S. E. 219. It was held that a landlord can bring

ejectment against a tenant after the expiration of his term but if he elects so to do he must not merely show that the tenants recognized him as landlord but that he really has title. A notice to quit is not essential, *Blocker v. McClendon*, (Ind. Ter. 1906) 98 S. W. 166. In ejectment where both parties claim from a common source the complainants need not show title from the state, *Rucker v. Hyde*, (Tenn. 1907) 100 S. W. 739. In Alabama in a statutory action in the nature of ejectment the plaintiff must show a regular chain of title back to some grantor in possession or to the United States government, *Henry v. Brannan*, (Ala. 1906) 42 S. 995.

Plaintiff failed to establish his right to possession and that defendant was in possession in *Bridenbaugh v. Bryant*, (Neb. 1907) 112 N. W. 571. Where a testator devised to his wife land on condition that she pay a son a certain sum when he came of age and the son reached his majority in 1888 but made no entry upon the land which was in his mother's possession and allowed her to lease it for a five-year term he could not in 1902 maintain ejectment against the tenant, *Pierce v. Lee*, 197 Mo. 480, 95 S. W. 426.

Documents. When in ejectment part of the plaintiff's claim of title was an unpaid mortgage upon which a payment was credited after the law day and at the same time a conveyance made by the mortgagor to the mortgagee, the mortgage was evidence of title. After the law day the mortgagee's title became absolute at law and the later conveyance, therefore, was ineffective to pass title, *Foster v. Carlisle*, (Ala. 1906) 42 S. 441. When the defendant in ejectment is in actual possession of the land in controversy, the plaintiff cannot recover when he fails to show legal title in himself or that he was in prior actual possession of the land and was ousted by the defendant. He therefore cannot recover when he offers no documentary evidence of title, merely stating that the record of his deed was destroyed by fire, that he paid taxes thereon and had an agent look out for it, but failed to show any actual occupation, cultivation, improvement or fencing of any part, *Harris v. Butler*, (Fla. 1906) 42 S. 186.

Burden of proof. In an action of ejectment the burden of proof is continuously on the plaintiff, *Sutton v. Whetstone*, (S. D. 1907) 112 N. W. 850. When the plaintiff in an action for ejectment merely shows an older chain of title than the defendant, he cannot recover unless the evidence is very

strongly in his favor, as the burden of proof is on him to prove his own title. See Acts 1905, p. 947, c. 773, *Mitchell v. Garrett*, 140 N. C. 397, 53 S. E. 226. Where the defendant in an action of ejectment by his answer denies the plaintiff's possession and ownership the burden of proof is upon the plaintiff although the defendant in his answer also sets out title affirmatively in himself, *Young v. Duggin*, (Ky. 1907) 99 S. W. 655. When the plaintiff in ejectment claims all the land in certain boundaries, the burden of proof rests on him to show what the outer boundaries are, and when some parcels within the outer boundaries are excluded he must show the exact location of their boundaries, *Pennington v. Underwood*, 59 W. Va. 340, 53 S. E. 465.

Sec. 115. Pleadings. As to pleadings in ejectment see *Glos v. Spitzer*, 226 Ill. 82, 80 N. E. 743. In a statutory action in the nature of ejectment when both parties disclaimed possession and issue was joined on the disclaimer, the plaintiff's title was thereby admitted and it was only necessary for him to show that the defendants were in possession, *Shiver v. Hardy*, (Ala. 1905) 39 S. 669. The pleadings in an action examined and it was held that the action was one of ejectment, not a petition to quiet title to real estate, the additional prayer contained in the petition that the plaintiff be quieted in his possession being merely surplusage, *Turner v. Johnson*, (Ky. 1906) 93 S. W. 1038.

Complaints. Rev. St. 1898, sec. 3077, specifying the allegations which must be inserted in a complaint in ejectment, construed, *Wisconsin River Land Co. v. Paine Lumber Co.*, 130 Wis. 393, 110 N. W. 220. As to allegations necessary where complainant has conveyed the property by deed with a condition subsequent which he claims has been broken, see *Mash v. Bloom*, (Wis. 1908) 114 N. W. 457. In ejectment the plaintiff need not set out the claim of title relied on, as it is sufficient to allege that he is the owner and entitled to the possession of the described premises and that the defendants wrongfully hold possession thereof, *Morris v. Martin*, 31 Ky. Law Rep. 216, 101 S. W. 914.

Defences. Florida Rev. St. 1892, section 1047, as to pleas at law based upon equitable grounds applies to ejectment, *Smith v. Love*, 49 Fla. 230, 38 S. 376. If defendant relies upon title by adverse possession he is entitled to go to

the jury upon that point, *Link v. Campbell*, (Neb. 1905) 104 N. W. 939. As to the effect of the plea of "not guilty" in ejectment under the Illinois Statutes, see *Village of Shumway v. Leturno*, 225 Ill. 601, 80 N. E. 403. The plea of "not guilty" in ejectment admits the lease, entry, and ouster and leaves the plaintiff with the burden only of proving title and right of possession of one of the lessors, *Collier v. Doe exdem. Alexander*, 142 Ala. 422, 38 S. 244. The prosecution of an ejectment suit will not be enjoined nor the deed under which the plaintiffs claim cancelled upon the ground that the deed and the record had been fraudulently altered, *Wilson v. Miller*, 143 Ala. 264, 39 S. 178.

Sec. 116. Defences. A plaintiff who bought in an outstanding title after an adjudication against her own title could plead it in a later action of ejectment brought by her to test its validity, *Wadley v. Leggitt*, (Ark. 1907) 101 S. W. 720. Title by adverse possession constitutes a complete defence in ejectment and is therefore no ground for enjoining afterwards the execution of a judgment for the plaintiff, *Johnson v. Oldham*, 146 Ala. 680, 40 S. 213. In ejectment it may be shown that the defendant bought from the state and took possession to prove the nature and character of his possession and claim so as to exempt him from the provisions of Alabama Code 1896, section 1541, as to one who enters land without color of title, *Brannon v. Henry*, 142 Ala. 698, 39 S. 92. When a memorandum on the back of a mortgage deed says it will be null and void on repayment of the principal and 20 per cent. interest, the deed is infected with usury and is null and void, and usury is a valid defence in an action of ejectment, *McBrayer v. Walker*, 122 Ga. 245, 50 S. E. 95. An answer in ejectment denying the plaintiff's ownership and right to possession is good although the plaintiff's complaint sets forth a deed from the state for taxes which constitutes *prima facie* evidence of title, because the plaintiff being out of possession must prove absolutely his own title. But the defendant on the same showing is not entitled to relief by way of a cross complaint asking for cancellation of the tax deed as a cloud on title, *Cook v. Ziff Colored Masonic Lodge*, 80 Ark. 31, 96 S. W. 618. An immemorial usage permitting littoral proprietors to wharf out as a right appurtenant to the ownership, actually exercised, together with the fact that the rights

of a city therein have been vested in a commission, are defences to ejectment by the city to recover such wharf property and are therefore not a ground for enjoining such an action. Neither is the fact that the plaintiff if successful intends to use the property recovered unlawfully, nor that it denies the defendant's rights to certain improvements, *Murray v. Barnes*, 146 Ala. 688, 40 S. 348.

Sec. 117. Practice—Damages. In ejectment all the plaintiffs must recover or none can, *Dake v. Sewell*, 145 Ala. 581, 39 S. 819. Plaintiffs in ejectment who sue as heirs cannot recover the entire interest where they fail to show that they are all the heirs, and to recover a proportionate interest they must show what that interest is, *Hudson v. Vaughn*, 147 Ala. 690, 40 S. 757. To determine the rights of the parties in a house built partly on defendant's and partly on plaintiff's land an action of ejectment is proper and to preserve the property during the litigation a decree restraining waste will be granted, *Cromwell v. Hughes*, 144 Mich. 3, 107 N. W. 323. In an action to determine adverse claims to land in which the complaint is in the form prescribed by Ch. 5, p. 9, Laws 1901, it is the duty of the trial court to determine the validity of the claims presented by the defendant, viz: that he held a mortgage on the land and title by sheriff's sale, *Spencer v. Beiseker*, (N. D. 1906) 107 N. W. 189. In ejectment where the defendant disclaims possession the plaintiff may elect to take issue thereon or decline so to do and take judgment without costs, *Calumet Coal Co. v. Cordova Coal Co.*, 145 Ala. 578, 40 S. 390.

Costs. Mississippi Code 1892, section 1653, allowing the costs of a survey in ejectment, construed, *Lenoir v. People's Bank*, 87 Miss. 559, 40 S. 5. Under Code of Civil Procedure 1902, sec. 98, subd. 2, a second action for the recovery of real property may not be maintained till the costs of the first action have been paid; such payment being a condition precedent and essential, the performance should be alleged in the complaint of the plaintiff. In default of such mention it is proper for the defendant to amend his answer, alleging such non-performance, *Peterman v. Pope*, 74 S. C. 296, 54 S. E. 569.

In Missouri one action in ejectment does not bar another action in ejectment between the same parties, in respect to the

same title and the same tract of land. It is because of this, that it becomes necessary, in order to put a stop to repeated actions of ejectment, to resort to bills of peace, *Crowl v. Crowl*, 195 Mo. 338, 92 S. W. 890.

Rents and improvements. Missouri Rev. St. 1899, sections 3067, 3068, and 3072 as to the right of a successful plaintiff in ejectment to the rents and profits, and the counter right of one dispossessed to recover compensation for improvements, construed, *Dawkins v. Griffin*, 195 Mo. 430, 94 S. W. 525. As the Alabama Statutes have changed the common law rule by allowing the recovery of damages for mesne profits in ejectment the successful plaintiff therein in order to recover damages in a later action of trespass must show that the damage was done after the ejectment suit was brought, *Henry v. Davis*, (Ala. 1907) 43 S. 122. An action by an unsuccessful defendant in ejectment to recover the value of improvements put on the land by him, is not such a continuation of the ejectment suit as gives the Missouri Supreme Court jurisdiction, *Bristol v. Thompson*, 204 Mo. 366, 102 S. W. 991.

Right to discontinue. Where the plaintiff in ejectment had filed among his muniments of title a transcript from the land office which the court during the argument ruled was only secondary evidence, and therefore he moved for leave to lay the foundation for its introduction as such but the court not only overruled his motion but refused to allow him to become non-suit, it was held that he should have been permitted to become non-suit. A case is not finally submitted in Arkansas until the argument is closed, and the plaintiff has a statutory right to non-suit until final submission, *Carpenter v. Dressler*, 76 Ark. 400, 89 S. W. 89.

Consolidation. A Missouri court has no power to consolidate several suits in ejectment and to set aside an alleged invalid deed brought by the same plaintiffs against different defendants, although some of the questions involved were the same, *Priddy v. MacKenzie*, 205 Mo. 181, 103 S. W. 968.

Transfer to equity. Where in an action of ejectment the plaintiffs in reply to the defendant's answer set up that a deed upon which the defendant relied was fraudulent the transfer of the case to the equity docket was not only proper, but indispensably necessary, *Hunt v. Nance*, (Ky. 1906) 92 S. W. 6.

EMINENT DOMAIN

Construction and grading of streets and sidewalks and construction and operation of railways and building of embankments therein as taking of property, see HIGHWAYS.

Sec. 118. Who may take—Who is responsible for taking. Indiana Acts 1905, p. 59, c. 48, as to condemnation proceedings construed and held constitutional. A *de facto* corporation may maintain such proceedings, *Morrison v. Indianapolis & W. Ry. Co.*, 166 Ind. 511, 76 N. E. 961. The owners of the M. Company were also the owners of a small freight railroad which was incorporated, but this did not prevent the railroad from exercising its right of eminent domain to establish an extension of its line for the public use which would benefit at present only the M. Company, and the railroad had a valid right to take the defendant's land by condemnation proceedings, *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27.

If a driving company has leased its dams to a timber company which has only floated its own logs on the stream its right to improve the river by a taking under power of eminent domain has not been lost under Ballinger's Ann. Codes and St., section 4393, provided no demand by the public had been made to float timber on the stream, *State ex rel. Wilson v. Superior Court*, (Wash. 1907) 92 Pac. 269.

Although a domestic corporation may exercise the right of eminent domain to erect a dam supplying electric power for mines and smelters, a foreign corporation has no such right under Civ. Code of Montana, div. 1, pt. 4; or Code Civ. Proc., section 2211, *Helena P. T. Co. v. Spratt*, (Mont. 1907) 88 Pac. 773.

A consolidated railroad company has a right to exercise the power of eminent domain, if the constituent companies had that power, *Smith v. Cleveland Ry. Co.* (Ind. 1907) 81 N. E. 501.

Laws 1889, 90, p. 718, s. 42, and p. 719-721, s. 44, 54, relating to the condemnation of water rights of riparian owners for a public use, were construed to grant a company, which had constructed a long canal to supply water, a right to the number of inches of water it needed as a public service cor-

poration, when it had organized to sell the water before any other corporation had appropriated it. The plaintiff owning the lower unused riparian rights merely had a prior right to as much water as he actually needed for his riparian land on the non-navigable stream. The filing of the map was not required to secure a location for a water company by eminent domain under the above statutes, *State ex rel. Kettle Falls P. & I. Co. v. Superior Court*, (Wash. 1907) 90 Pac. 650.

When an award has been made in a condemnation proceeding against a railroad and it was increased on appeal during the course of which another company bought the franchise and entered into possession, the plaintiff may enforce the award against the purchasing company by a personal suit, *Missouri, K. & T. Ry. Co. v. Murphy*, (Kan. 1907) 90 Pac. 291.

Sec. 119. Enabling statutes noted and construed.

General acts. Title 21, section 2445 (sec. 2)—3 Rev. Stat. enumerating the uses for which the right of eminent domain may be exercised, amended by Ariz. Laws of 1907, Ch. 91, sec. 1. The purposes for which the right of eminent domain may be exercised in California are fully enumerated by Cal. Stat. 1906, Ch. 50, amending Code, sec. 1238. Sec. 1240 of the Code of Civil Procedure, specifying the property which may be taken under the law of eminent domain and authorizing proceedings therefor is amended by Cal. Stat. 1907, Ch. 271. The uses in behalf of which the right of eminent domain may be exercised are prescribed by Cal. Stat. 1907, Ch. 399, amending sec. 1238 of the Code. As to the rights of eminent domain given the City of Stamford, Conn., by its charter, see *Bohannon v. Stamford*, (Conn. 1907) 67 Atl. 372. Proceedings in condemnation of lands under power of eminent domain regulated by Id. Laws 1907, Sen. Bill No. 103, amending Rev. Stat. 1887, Code of Civil Proc., tit. 7, sec. 5216. Cities of a certain size are authorized to condemn land in the same manner prescribed for public service corporations by Mo. Laws 1907, p. III. The uses in behalf of which the right of eminent domain may be exercised are enumerated in Mont. Laws 1907, Ch. 4, amending Code of Civ. Proc., pt. 3, Ch. 1, tit. 7, sec. 2211. The exercise of the right of eminent domain is regulated in detail by Nev. Laws 1907, Ch. 128.

Cities desiring to make improvements authorized by Act of April 8, 1903, are authorized to take land by purchase or condemnation by N. J. Laws 1907, Ch. 151. The appropriation of land by corporations is regulated by Ore. Laws 1906, Ch. 66. The right of eminent domain is conferred upon certain public service corporations by Ore. Laws 1907, Ch. 147, amending sections 5074, 5075 and 5094 of B. & C.'s Codes. Cities are authorized to take lands for various public uses by Pa. Laws 1907, No. 10. The taking and use of water for municipal purposes, by private corporations and municipalities, are regulated by Pa. Laws 1907, No. 212. Act of June 10, 1901, authorizing towns to take private property for public uses is amended by Pa. Laws 1907, No. 264. The method by which corporations may secure possession of land taken by eminent domain is prescribed by Pa. Laws 1907, No. 310. Sec. 3588, Rev. Stat. 1898, as amended by Ch. 25, Laws 1901, providing for the uses in which the right may be exercised, further amended by Utah Laws 1907, Ch. 114. The proceedings to be taken by corporations in condemning land are set forth in detail by Va. Acts 1906, Ch. 257. The taking of land by cities of over 1,500 inhabitants is regulated by Wash. Laws 1907, Ch. 153. Procedure in condemnation of lands owned by the state is regulated by Wash. Laws 1907, Ch. 219. The public uses for which private property may be taken are enumerated in W. Va. Acts 1907, Ch. 13.

Canals. Louisiana Civ. Code, art. 2637, and Rev. St. 1870, s. 1486, construed in *Shreveport v. Noel*, 114 La. 187, 38 S. 137. Companies formed to build canals to connect the Great Lakes with rivers of Pa. are authorized to take lands and waters by Pa. Laws 1907, No. 318. Condemnation of land for canals, Wy. Laws 1907, Ch. 52.

Cemeteries. Lands may be condemned by cities and towns to enlarge cemeteries, N. Car. Laws 1907, Ch. 172.

Electric companies. Corporations organized to supply electricity are given power to condemn land and the procedure is regulated by Ark. Acts of 1907, No. 120. Electric companies' right to take by eminent domain is governed by Ark. Laws of 1907, No. 130. Telegraph, telephone, electric light, power and pipe line companies are given power to obtain rights of way by exercising the right of eminent domain over public or private lands by Col. Laws 1907, Ch. 175. A right of way for an electric company for the erection of its poles, towers

and wires is a public use and a statute authorizing its taking is constitutional, *Jones v. North Georgia Electric Co.*, 125 Ga. 618, 54 S. E. 85. Corporations distributing electricity for heating, lighting and power purposes are given power to condemn lands and easements therein by Ind. Laws 1907, Ch. 172, sec. 8. Persons operating electric light plants are given the power of eminent domain by N. Car. Laws 1907, Ch. 783, amending Ch. 61 Revisal. Corporations generating and transmitting electricity are given power of eminent domain by Wash. Laws 1907, Ch. 159.

Gas companies. Gas companies are given the same powers of eminent domain as are possessed by companies mining petroleum and natural gas under the Act of Feb. 20, 1889, by Ind. Laws 1907, Ch. 201.

Hospitals. City Council may condemn land for hospitals, Ia. Laws 1906, Ch. 22, sec. 5. Hospitals for the injured and the insane authorized to take land for building purposes and land and water for water supplies by Pa. Laws 1907, No. 288.

Irrigation and drainage. Sewers. Trustees of reclamation districts are empowered to acquire rights of way, etc., by condemnation proceedings in accordance with the code by Cal. Stat. 1907, Ch. 54, amending sec. 3471 of the Political Code. Irrigation districts are given the right of eminent domain by Id. Laws 1907, Ho. Bill No. 220. The powers of eminent domain to be exercised by the Zazoo—Miss. Delta Levee Board are prescribed by Miss. Laws 1906, Ch. 125, amending various acts. Boards of directors of irrigation works are given right of eminent domain by Mont. Laws 1907, Ch. 70, sec. 48. Drainage districts are given the power of eminent domain, to be exercised as provided for railroad companies, by Neb. Laws 1907, Ch. 153, sec. 14. Sewerage boards are given power to condemn lands by N. J. Laws 1906, Ch. 293. Diking districts organized under Act of March 20, 1895, are given power of eminent domain by Wash. Laws 1907, Ch. 95. Condemnation of land for ditches, Wy. Laws 1907, Ch. 52.

Parks. Cities are authorized to acquire private lands for park purposes by Pa. Laws 1907, No. 315.

Public buildings. The Governor is authorized to condemn land for public buildings by Ind. Laws 1907, Ch. 140. The method of taking lands for hospitals, schools, and for

the construction of the works of public service corporations is fixed by La. Acts 1906, No. 208. Cities of over 50,000 inhabitants are authorized to condemn lands for public buildings by Minn. Laws 1907, Ch. 291. Municipal corporations are authorized to condemn land for public buildings and works by S. Car. Acts 1907, No. 300.

Roads and bridges. Louisiana Civ. Code, art. 2637, and Rev. St. 1870, section 1486, apply to expropriation proceedings for railroad and canal purposes, not to widen a street, *Shreveport v. Noel*, 114 La. 187, 38 S. 137. Mass. Rev. Laws, c. 48, section 22, which provides that where several persons have several estate in land sought to be taken for a highway the jury shall estimate the damages as an entire estate and other sections under the same chapter, construed, *Boston Chamber of Commerce v. Boston*, 195 Mass. 338, 81 N. E. 244. The use of the right of eminent domain for temporary logging roads is regulated by Mont. Laws 1907, Ch. 89, amending Code Civ. Proc., tit. 7, pt. 3. County boards are given authority to condemn lands for the protection of their roads and bridges by Neb. Laws 1907, Ch. 113. Municipalities are authorized to take lands for the reconstruction of roads damaged by overflowing reservoirs by Pa. Laws 1907, No. 129. Boroughs are authorized to take land necessary for the erection of bridges over railroads and streams by Pa. Laws 1907 No. 188. By the act of March 17, 1869 (P. L. 12) certain railroad corporations were given the right to condemn dwelling houses when necessary to widen the right of way, and when it was proved to the satisfaction of the court that such necessity existed. Under the terms of this act one of the companies specified had a right to condemn the plaintiff's land and dwelling house, although it had leased its road and rights to another corporation, *Snyder v. Baltimore & Ohio R. Co.*, 210 Pa. 500, 60 S. E. 151. Tennessee Constitution, Article 1, section 21, providing for compensation when land is taken construed in connection with Shannon's Tennessee Code, section 1865 as to taking a right of way by eminent domain, *Chicago Ry. Co. v. Mogridge*, (Tenn. 1906) 92 S. W. 1114. Counties are authorized to take land and rights therein for highways by Tenn. Acts 1907, Ch. 314, and for bridges by Ch. 583. State Highway Board is authorized to condemn land for roads by Wash. Laws 1907, Ch. 149. The keeping of records of taking of land for

changes in streets in counties of 250,000 is prescribed by Wis. Laws 1907, Ch. 229.

Schools. As to school lands, see further *post* §464. School authorities are given right to take land by eminent domain by Ill. Laws 1907, p. 522. The Illinois School Law, art 5, section 31, as to the power of the board of school directors to buy or locate a schoolhouse site, construed, *Thompson v. Trustees of Schools of Rio Tp.*, 218 Ill. 540, 75 N. E. 1048. In Ohio Territory a special school district is not open to be taken in whole or in part to form a new special school district. The successive statutes on the subject are discussed, *Scott v. McCullough*, 72 Ohio 538, 75 N. E. 52. When the schools of a township have been centralized none of such territory may be taken to form a special school district, *Fulks v. Wright*, 72 Ohio, 547, 75 N. E. 55. The condemnation, by towns, of land for school purposes, is regulated by R. O. Laws 1906, Ch. 1306.

The taking of land for schoolhouse sites in cities is regulated by Neb. Laws 1907, Ch. 126, amending C. A. S. 11166.

Telephone and telegraph companies. See *Bell Telephone Co. v. Parker*, 187 N. Y. 299, 79 N. E. 1008. The Ohio statutes do not give the probate court power to grant a telephone company the right to put its wires and apparatus in conduits under the city streets in the absence of consent by the municipal authorities, *Queen City Telephone Co. v. Cincinnati*, 73 Ohio St. 64, 76 N. E. 392. As telegraph and telephone companies are entirely distinct in their nature, a telephone company under the Mississippi Code 1892, sections 854-858 inclusive has no authority to condemn land by eminent domain. But where a company is chartered as a telegraph company the owner of land in eminent domain proceedings cannot show that it is a dummy company for a telephone company. Such a question can only be raised by the state, *Alabama, etc., Ry. Co. v. Cumberland Tel. & Tel. Co.*, 88 Miss. 438, 41 S. 258.

Transportation companies. Railroads are authorized to condemn lands for depots, freight yards and steam tracks with approval of Railroad Commission by Ala. Laws of 1907, No. 204. Railroads are given power to take lands in the manner provided in title 7, part 3 of the Code of Civil Procedure by Cal. Stat. 1907, Ch. 78, sec. 7, amending sec. 465 of the act to establish a Civil Code approved March 21, 1872.

The right of eminent domain is granted to tunnel transportation companies, pipe line transmission companies, electric power transmission companies and aerial tramway companies by Col. Laws 1907, Ch. 125. Illinois Laws 1891, p. 184, which permits the organization of corporations to build a railroad with fixed termini between places named in the articles of incorporation does not authorize the formation of a company to build lines of railroad inside a city to connect with belt lines adjoining the city, *Gillette v. Aurora Ry. Co.*, 228 Ill. 261, 81 N. E. 1005. Companies organized to build union stations are given authority to condemn land by Ky. Laws 1906, Ch. 91. Sec. 6234, Comp. Laws 1897, giving railroad, bridge and tunnel companies the right to take and hold land is amended by Mich. Acts 1907, No. 54. Under Gen. St. 1894, c. 34, tit. 1, sec. 2592, a company organized to build an interurban railway may exercise the right of eminent domain, *In re Minneapolis & St. P. Suburban Ry. Co.*, 101 Minn. 132, 112 N. W. 13. Procedure for the condemnation of lands by railroads and other public service corporations is provided by Mo. Laws 1907, p. 165. Electric interurban railroads are authorized to condemn land for rights of way by Mo. Laws 1907, p. 174. Railroads are given right of eminent domain for branch lines by N. Mex. Acts 1907, Ch. 27, amending Ch. 9, sec. 1, Acts 1901. Urban electric railways are given the same powers of eminent domain as steam by N. D. Laws 1907, Ch. 212.. Street railway companies may take private property for their tracks and buildings, etc., Pa. Laws 1907, Nos. 266 and 332. Where a railroad is constructing its terminal and before any trains have been run on the road, it can not use the Act of 1869, March 17, (P. L. 12) authorizing the condemnation of dwelling houses to widen its right of way when the growing necessities and business of the road demand it, to condemn a dwelling house in order to use the land for terminal purposes, *O'Leary v. Wabash, Pittsburgh T. Ry. Co.*, 210 Pa. 522, 60 Atl. 164. Street railroads are given power to take land by eminent domain by Tenn. Acts 1907, Ch. 446. The methods whereby railroads may condemn real estate for tracks are prescribed by Tenn. Acts 1907, Ch. 464. Interurban electric railroad companies are given the power of eminent domain by Tex. Laws 1907, Ch. 15. Railroads are given power of eminent domain by Utah Laws 1907, Ch. 93, subd. 3. Sec. 4334, B's Codes, authoriz-

ing railway and other corporations to condemn land, is amended by Wash. Laws 1907, Ch. 244. Under St. 1898, secs. 1862 and 1863, electric interurban railroads have the right of eminent domain, *In re Milwaukee Light, Heat & Traction Co.*, (Wis. 1907) 112 N. W. 663.

Water-works. Sec. 2926 of Kirby's Digest, giving right of eminent domain to water companies is amended by Ark. Laws of 1907, No. 130. Code Civ. Proc., s. 1238, relating to the condemnation by right of eminent domain of property to be used to supply water to cities, towns, etc., was construed, *Hercules Water Co. v. Fernandez*, (Cal. 1907) 91 Pac. 401. Trustees and directors of state institutions authorized to take land and water for water supply; proceedings prescribed by Conn. Acts 1907, Ch. 84. Cities and towns are given power to take property for the construction of dams for water works by Ia. Laws 1906, Ch. 20, amending sec. 722 of the Code. Pipe line companies are given rights of way over public lands by La. Acts 1906, No. 39. A taking of land under Mass. St. 1893, p. 911, c. 277, authorizing a town to take lands and easements necessary for water supply, includes an easement owned by third persons. *Walpole v. Mass. Chemical Co.*, 192 Mass. 66, 78 N. E. 140. Mass. Acts 1902, Chapter 486, p. 394, authorizing the South Deerfield water supply district to take a certain brook by eminent domain, construed, *McLeod v. Deerfield District*, 193 Mass. 6, 78 N. E. 764. Under Rev. Laws 1905, sec. 2841, a company formed to supply water, heat, light and power may take private property; but may not interfere with navigable waters unless specially authorized, *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395. Corporations organized to develop water power in certain streams are given power of eminent domain by N. J. Laws 1906, Ch. 127.. Municipalities may take land for the protection of the water supply under Pa. Laws 1907, No. 129. Water companies in towns of 500-600 inhabitants are authorized to take land and water rights by Tenn. Acts 1907, Ch. 78. Cities and towns owning water works and private water companies are authorized to take water and land for pipe lines by Tenn. Acts 1907, Ch. 159. Railroads are authorized to take water and lands for reservoirs and pipe lines by Tenn. Acts 1907, Ch. 254. Cities are authorized to condemn lands for water sheds and for laying pipes by Va. Acts 1906, Ch. 96. The procedure to be fol-

lowed in the condemnation of land for reservoirs is prescribed by Wy. Laws 1907, Ch. 52.

Miscellaneous. Flume companies are given power of eminent domain by N. Car. Laws 1907, Ch. 39, amending Ch. 61, subch. 5, Rev. of 1905. Idaho constitution, sec. 14, art 1 and Rev. St. 1887, sec. 5210, subdivision 3, as amended by Laws of 1903, p. 204, were construed to give a lumber company the right to take land, which was necessary for the construction of a splash dam to facilitate the floating of logs down a non navigable stream by right of eminent domain. Potlatch Lumber Co. v. Peterson, (Idaho 1906) 88 Pa. 426. Park commissioners are given authority to take submerged and shore lands by Ill. Laws 1907, p. 433. Hurd's Illinois Rev. St. 1905, c. 24, section 194, authorizing a city to acquire land by eminent domain for a ferry, construed, Helm v. Grayville, 224 Ill. 274, 79 N. E. 689. Ballinger's Ann. Codes & St., ss. 938, 944, relating to the improvement of rivers, were construed to give a city of the third class the authority to condemn land to straighten a river which was the boundary of the city, and if necessary land might be taken for this purpose, although it was outside the city limits, City of Puyallup v. Lacey, 43 Wash. 110, 86 Pac. 215.

Sec. 120. Condemnation of land already taken for a public use—Highways A county may not appropriate school lands for a road not on section lines, State v. Boone County, (Neb. 1907) 110 N. W. 629. Lands of educational institutions and religious societies are forbidden to be taken for public schools by Pa. Laws 1907, No. 99. A company held a certain tract of land which was covered at high water to sort logs on, and had used it only twice during eight years, but a railroad company had a right to condemn it for its right of way, although the boom company already held it for a public use as a public service corporation, State ex rel. Skamania Boom Co. v. Superior Court, (Wash. 1907) 91 Pac. 637.

Use of highway. Under a city charter giving the city the right to demand compensation for any portion of its streets vacated a street railway must pay at least nominal damages on condemning a right of way over streets, City of South Omaha v. Omaha Bridge & Terminal Ry. Co., (Neb. 1906) 107 N. W. 988. Under the Greater N. Y. Charter, (Laws 1901, p. 423, c. 466) where a new street was opened

in part over land previously taken in fee by the city for water supply and paid for by general city bonds, the city is entitled to an award for damages in the same way that other land owners are, *In re Van Cortlandt Ave.*, N. Y., 186 N. Y., 237, 78 N. E. 952. An interurban railroad may take by eminent domain a location in the highway, but must compensate abutting owners for any damage occasioned, *Marsh et al. v. Milwaukee L., H. & Traction Co.* (Wis. 1908), 114 N. W. 804, 813, 815.

Sec. 121. Taking of railroad lands by another railroad or other party.

Taking of crossings over railroads, see *post* §§481, 482.

On taking by state, compensation must be made for value of franchise, *Laws 1846, No. 42, sec. 39, Mich. Cent. R. Co. v. State*, 148 Mich. 151, 111 N. W. 735. Various Arkansas statutes authorizing telephone companies to enter a railroad right of way, construed, *St. Louis Ry. Co. v. Batesville Telephone Co.*, 80 Ark. 489, 97 S. W. 660. If a railroad owns the fee in land, and builds a railroad over it, a town cannot construct a street over it without paying compensation to the railroad, *Town of Poulan v. Atlantic C. L. Ry. Co.*, 123 Ga. 605, 51 S. E. 657. A city ordinance granting a railroad the right to build tracks, spurs, sidings, and switches upon a street and a permanent building upon a public landing is void as such uses would deprive the public of their right to have both open for use, *Chicago Ry. Co. v. People*, 222 Ill. 427, 78 N. E. 790. Missouri Ann. Statutes 1906, p. 1028, authorizing telephone and telegraph companies to condemn easements, construed, and it was held that the construction of such a line along one side of a railroad right of way, the other side already being occupied for the same purpose, would not materially interfere with the public use of the railroad's easement. But it could not be said that the railroad's right to construct such a line itself or rent the same for that purpose, was under the circumstances of mere nominal value, *Am. Tel. & Tel. Co. v. St. Louis Ry. Co.*, (Mo. 1907) 101 S. W. 576.

Taking by another railroad. Where one railroad company condemns land not actually in use, of another railroad company, the future needs of the first company must yield to the present wants of the second company, *Atlanta & W.*

P. R. Co. v. Atlanta B. & A. R. Co., 124 Ga. 125, 52 S. E. 320. A railroad company cannot, simply by running its preliminary line, and purchasing, as an ordinary purchaser, the lands over which its survey has been extended, so impress such lands with a public character as to pre-empt them as against another company which as an instrumentality of the state, and to serve its purposes, has done what is necessary under the statute to subject the property to the servitude of a railway, Southern Indiana Ry. Co. v. Indianapolis, etc., Ry. Co., 168 Ind. 360, 81 N. E. 65. A railroad company has a right to condemn a right of way across a lumber road used exclusively to carry on the private business of a lumber company, as it is not a common carrier, and the fact that the railroad does not have any station for a distance of 12 miles on its road in order not to contaminate the public water supply does not deprive the railroad of its right to take property by right of eminent domain, State ex rel. Kent Lumber Co. v. Superior Court of King County, (Wash. 1907) 90 Pac. 663. A railroad company having acquired priority of right to condemnation through a preliminary survey of its line of railroad may not change its surveyed lines thereby coming into contact with the rights of another company, West Virginia Short Line R. Co. v. Belington & N. R. Co., 56 W. Va. 360, 49 S. E. 460. The county authorities of Henrico seek to construct a public thoroughfare across the land of a railroad company purchased and used as a railroad yard and where engines are constantly employed in shifting cars and making up trains. The general power under Code 1887, sections 1095, 1096, is insufficient to authorize the condemnation for highway purposes such property, Richmond, F. & P. R. Co. v. Johnston, 103 Va. 456, 49 S. E. 496. Ch. 52, sec. 11, Code, relative to the crossing, by a railroad, turnpike, canal, or pipe line company of the line of any other company or of a state or county road, is amended by W. Va. Acts 1907, ch. 43.

Under Ballinger's Ann. Codes & St., section 4335, a railroad has no right merely from motives of economy to condemn a location across the yards and terminal tracks of another railroad, which is a public service corporation, but it may be compelled to take another practicable route which is slightly more expensive, State ex rel. Portland & Seattle Ry. Co. v. Superior Court, (Wash. 1907) 88 Pac. 201. When one railroad wishes to pass through the terminals of another

road, it will only be allowed in case of absolute necessity, and where it is shown that a different but more expensive location can be taken, it will not be allowed to pass through the terminal if the railroad owning it has no more terminal facilities than it will need, *State ex rel. Spokane Falls & N. Ry. Co. v. Superior Court of Spokane Co.*, 40 Wash. 389, 82 Pac. 417. See *Sanitary Dist. of Chicago v. Pittsburgh, Ft. W. & C. Ry. Co.*, 216 Ill. 575, 75 N. E. 248, as to damages for a taking of a railroad terminal.

Sec. 122. What is public use—Railroads—Height of buildings.

Drainage as public use, see *ante* §§97, 119.

N. Y. Laws 1898, p. 230, c. 122, authorizing Cornell University to acquire at State expense forest lands for experiments and to raise, cut, and sell timber, construed and held constitutional, *People v. Brooklyn Cooperage Co.*, 187 N. Y. 142, 79 N. E. 866. Where a company is organized to construct a tunnel to drain a number of mines furnishing ventilation and also a means of operating the mines, it is for a public use and a right of way may be condemned for it by right of eminent domain under *Laws 1891*, p. 98; section 3, (3 Mills Ann. St. Rev. Supp., section 616) *Tanner v. Treasury T. M. & R. Co.*, 35 Colo. 593, 83 Pac. 464. Although a corporation was authorized by its charter to supply electricity for lighting manufacturing, etc., it was not authorized to take land by right of eminent domain to erect poles on, when the company had passed the point where there was any possibility of selling current for lighting and where the company was constructing its line for the service of one consumer only who had contracted to take all the power furnished by the company. An injunction was issued to prevent the company from constructing its right of way over the plaintiff's land, *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785. A statute authorizing the owner of land entirely enclosed to have a way of necessity condemned, was held unconstitutional as not for a public purpose in, *Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 413.

Railroads. By law of 1887, p. 97, c. 46, which amends code sections 2056, 2057, railroads to transport timber may be built over private land and such land may be taken by condemnation, but the law is invalid when it grants the right to condemn lands for the use of a private railroad over which the general public

has no right to send timber or other merchandise, *Cozad v. Kanawha Hardwood Co.*, 139 N. C. 283, 51 S. E., 932. If under Acts of June 19, 1871 (P. L. 1360) and Acts of April 4, 1868, (P. L. 62) a railroad constructs its line through a country where there are no settlements and no business, that is no foundation for an injunction against taking certain property for a right of way on the ground that the railroad is not being constructed for the public use, as many railroads have successfully developed tracts of wilderness into prosperous communities, *Deemer v. Bells Runs R. Co.*, 212 Pa. 491, 61 Atl. 1014. A railway company duly chartered under the laws of the state as a railroad corporation and organized as such, sought to exercise the power of eminent domain and took the necessary steps for the purpose. One of the owners of condemned land contested the corporate existence of said company, denied its authority to construct and operate a line of railway, for which it was seeking to condemn land, denied that the land proposed to be taken was for public use and protested that therefore the applicant had no right to condemn the same. The testimony showed that the proposed line ran for two miles through a rough mountainous section to a tract of land rich in coal and lumber owned by the V. P. Coal Company, for which the proposed road would furnish an outlet to market. It was further shown that the majority of the stock of the Coal Company was held by C, who was also with his attorney and clerks a majority of the directors of the railroad company. Giving these contentions their full weight, and realizing that the promoters have in view a profitable investment, still the fact that the public has the right to use this road for its purposes, renders everything said against the right of the applicant to condemn this property insufficient to negative that right; the property of the coal company may be developed and the construction of the railroad may be of more importance to said company than to any individual or to any other company, yet this cannot be assigned as a reason why the use to which the property is to be put is not a public use, *Caretta Ry. Co. v. Virginia-Pocahontas Coal Co.*, (W. Va. 1907), 57 S. E. 401.

Height of buildings. Mass. Statutes of the years 1896, 1897 and 1898 limiting the height of buildings in Copley Square, Boston, and giving any person damaged thereby a right to recover his damages, construed, *Williams v. Boston*,

190 Mass. 541, 77 N. E. 509. Various Massachusetts statutes restricting the height of buildings near the State House and the time within which petitions for damages may be brought, construed, *Raymond v. Commonwealth*, 192 Mass. 486, 78 N. E. 514.

Sec. 123. Use of power—Whether arbitrary or in good faith. The legislature granted to a company the right to condemn lands for a new union depot; this being for a public use, the company may condemn property suitable for its purpose when it owns no suitable land itself, although its stockholders may own property which might be used, *Riley v. Charlestown Union Sta. Co.*, 71 S. C. 457, 51 S. E. 485. Montana Civ. Code, par. 526, 890, 894, and Code Civ. Proc., par. 2211, amended by the Act of March 7, 1899, Montana Laws 1899, p. 135) were construed to grant a railroad the right to condemn land adjoining its right of way in order to divert a stream which crossed the right of way a number of times, *State ex rel. Bloomington Live Stock Co. v. District Court*, 34 Mont. 535, 88 Pac. 44. Texas Rev. Statutes 1895, arts. 4424 and 4445, as to the right of a railroad which is unable to agree with the owner for its purchase to condemn land, construed in connection with the Texas Constitution, article 1, section 17, and it was held thereunder that, although the railroad had an absolute right to select such right of way as it deems advantageous with regard to the location of repair and machine shops, it cannot act arbitrarily, *Rainey v. Red River Ry. Co.*, (Tex. 1905) 89 S. W. 768. Laws 1903, p. 366, c. 175, s. 2, granting electric railways the right to take property by eminent domain, was construed to allow the condemnation of land for flowage to create power for the company, although the franchises and rights of way of the company had not been granted, but were being diligently sought and no insuperable obstacle appeared, *State ex rel. Harlan v. C. C. E. Ry. & P. Co.*, 42 Wash. 632, 85 Pac. 344. In Louisiana a railroad which seeks to expropriate for a right of way has the burden of showing the necessity for eminent domain in the particular case. When a city ordinance granted permission to a steam railroad to use city streets and at the trial of a proceeding to condemn private land for the right of way it appeared that it was better for both the public and the railroad not to lay the tracks in the street the railroad was

not deprived by the ordinance of a right to condemn private land, *Louisiana Ry. & Nav. Co. v. Xavier Realty*, 115 La. 328, 39 S. 1.

Abuse of power. A railroad company, under *Cobbey's Ann. St. 1903*, section 9967, has no power to condemn land for the use of another company, *Beckman v. Lincoln & N. W. R. Co.*, (Neb. 1907) 112 N. W. 348. A corporation organized to generate electric power has no right to condemn a location on a river by right of eminent domain when it has no customers and no contracts for power, and no great public necessity appears to demand the taking, *State ex rel. Tacoma Industrial Co. v. White R. P. Co.*, 39 Wash. 648, 82 Pac. 150. A railroad authorized by charter to build a road from Kansas City to Lees Summit may not condemn land for a road from Kansas City to Swope Park, even if Swope Park be on the line between Kansas City and Lees Summit, where the whole record shows a purpose only to build to Swope Park, *Kansas City Interurban Ry. v. Davis*, 197 Mo. 669, 95, S. W. 881. Under *Sp. Acts Gen. Assem.*, Feb. 17, 1900, Acts 1899-1900, p. 423, c. 399, granting power of eminent domain to railroads to condemn property for the construction of branch lines to afford transportation facilities to manufacturing industries, a railroad may not build a road connecting and paralleling the main line in order to relieve freight congestion, and condemn property on the route by right of eminent domain, especially when the new line is to be more than two miles from the old line, violating sec. 1105 f, sub sec. 19, *Va. Code 1904*, *Norfolk & W. Ry. Co. v. Lynchburg Cotton Mill Co.*, 106 Va. 376, 56 S. E. 146. Laws 1889-90, p. 470, sec. 1, relating to the right of corporations to drive logs and determine the compensation due private parties for damages as the railroads have a right to do, was construed not to give the company a right to overflow private lands above highwater mark without purchase or condemnation, and an injunction against such use of the river was correct, *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937.

Judicial control over. See *post* §128. The use of the right to condemn is subject to review by the courts, *Grafton v. St. Paul M & M. Ry. Co.*, (N. D. 1907) 113 N. W. 598. When in proceedings to expropriate land for the building of a railroad the evidence shows no wanton purpose to inflict injury but on

the contrary that the route was selected in good faith the right of the company to choose its route will not be subjected to judicial control, *Colorado Southern, etc., R. Co. v. Boagni*, 118 La. 268, 42 S. 932. Where the right to condemn exists, and the property is subject to the exercise of the right of eminent domain and is being condemned for a public use, and the right to condemn is not being abused, the court can not deny the right to condemn on the ground that the exercise of the power is unnecessary or inexpedient, as the determination of that question devolves upon the legislative branch of the government, and is a question which the judicial branch of the government cannot determine. Under Illinois Laws 1889, p. 129, section 8, the Chicago Sanitary District was given power to take land used for a freight terminal by a railroad company, *Pittsburgh, Ft. W. & C. Ry Co. v. Sanitary Dist. of Chicago*, 218 Ill. 286, 75 N. E. 892.

Final location. Tennessee Acts 1887, p. 112, c. 39, authorizing the board of directors of a railroad which has not been finally located to change its terminal is constitutional, and was not repealed by Acts 1897, p. 271, c. 116. A company chartered to build a line from a certain point to another point at or near the southern boundary of a certain city by condemning a right of way from the first point to within three miles distant from the city boundary in question had not made a final location within the meaning of the statute where the remainder of its right of way had not been purchased and no survey thereof adopted, *Memphis & S. L. R. Co. v. Union Ry. Co.*, (Tenn. 1906) 95 S. W. 1019.

Sec. 124. Title acquired—Liabilities. Cities acquiring title by eminent domain are estopped to deny the validity of liens deducted from the appraisement, *City Safe Deposit & Agency Co. v. City of Omaha*, (Neb. 1907) 112 N. W. 598. As to the title obtained by *ad quod damnum* proceedings under Illinois Rev. St. 1845, c. 71, to acquire land for a dam, see *De Land v. Dixon Power & Lighting Co.*, 225 Ill. 212, 80 N. E. 125. The use of land which the state has decided to take will not be interfered with by the courts except so far as is necessary to preserve it in condition for the future use, *State ex rel. City of New Orleans v. Ellis*, 113 La. 555, 37 So. 209. The power of eminent domain "when exercised acts upon the land itself, not upon the title, or the sum of the

titles if there are diversified interests. Upon appropriation all inconsistent proprietary rights are divested, and not only privies but strangers are concluded. Thereafter whoever may have been the owner, or whatever may have been the quality of his estate he is entitled to full compensation according to his interest and the extent of the taking, but the paramount right is in the public, not as claiming under him by a statutory grant, but by an independent title." A taking for a sewer by a city did not give the latter an easement "by, through or under" the former owner whose covenant of warranty is not broken by the easement (2 judges dissenting) *Weeks v. Grace*, 194 Mass. 296, 80 N. E. 220.

A railroad taking land by eminent domain must make payment to all persons having an interest therein; it cannot therefore escape payment of taxes which are a lien on the land when the right of way is acquired, *State v. Mo. Pac. Ry. Co.*, (Neb. 1905) 105 N. W. 983.

Sec. 125. Notice to owner. Hurd's Illinois Rev. St. 1905, c. 42, section 93, 132, prescribing the form of notice to landowners in condemnation proceedings by a drainage district, construed, *Waite v. Commissioners of Special Drainage Dist.*, 226 Ill. 207, 80 N. E. 725. Ballinger's Ann. Codes & St., s. 4875, and Laws, c. 55, s. 5, was construed to authorize personal service on a defendant who lived outside the city, in a proceeding to take land for a street by eminent domain, *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256. Wyoming Rev. St. 1899, §§897-900, which grants the right to condemn land by right of eminent domain for irrigation ditches without a provision for notice and hearing for the owner, was construed as unconstitutional and void under Const. Art. 1, § 6, *Sterritt v. Young*, 14 Wyo. 146, 82 Pac. 946. Persons holding an easement in the land taken are not entitled to personal notice of condemnation proceedings under Mass. St. 1893, c. 277, *Walpole v. Mass. Chemical Co.*, 192 Mass. 66, 78 N. E. 140. Where one railroad sought to cross the works of another, and the officials of the two roads endeavored to reach an amicable settlement but were unable to do so, the required notice under Code 1904, § 12946, cl. 3, was given by the appellee, with the intention of beginning the proceedings required in such cases; the appellant claimed ignorance of the portent of the action of appellee,

but was permitted to assert all the rights it could have asserted under the Code strictly interpreted. Therefore as the appellant had received no injury it could not contend that the notice was insufficient, *Norfolk & W. Ry. Co. v. Tidewater Ry. Co.*, 105 Va. 129, 52 S. E. 852.

Sec. 126. Practice and Pleading. As to the practice in an action for damages by a landowner against a sanitary district for land taken by eminent domain, see, *Moll v. Sanitary Dist.*, Chicago, 228 Ill. 633, 81 N. E. 1147. As to the practice in condemnation proceedings under Indiana Acts 1905, p. 59, c. 48, and following, see, *Darrow v. Chicago, etc., Ry. Co.*, (Ind. 1907) 81 N. E. 1081. Rev. St. 1898, Sec. 1846-1848, 1850 and 1851, providing for the proceedings where land is taken by railroads, are construed as to proof of ownership in, *Murray Hill Land Co. v. Milwaukee Light, Heat & Traction Co.*, 126 Wis. 14, 104 N. W. 1003. Power was given a railroad to condemn lands, and the right to enter and construct its road upon such condemned lands, after payment in full of the assessed damages. It was held that an attempt at adjustment was to be made before condemnation, *City of Hickory v. Southern Ry. Co.*, 138 N. C. 311, 49 S. E. 202.

Right of action. Limitations. The proceeding prescribed by the statutes of Arkansas for the condemnation of land for right of way for a railroad is special. Its sole object is to ascertain the compensation that the railroad company shall pay for the right of way. For all damages occasioned by torts committed or wrongs done by the railway company the owners have remedies in actions to recover the same, *Pine Bluff Ry. Co. v. Kelley*, 78 Ark. 83, 93 S. W. 562. A cause of action for the detention of land for street purposes is in trespass, not contract, and if the owner has lost his right to recover damages in eminent domain proceedings he cannot recover in contract, *Hodgdon v. Haverhill*, 193 Mass. 327, 79 N. E. 818. Where a railroad in the construction of its embankments has done no act not reasonably necessary and proper, the plaintiffs, landowners, cannot sue at common law in tort for damages, their only remedy being under the eminent domain statute, *Todd v. Old Colony R. Co.*, 194 Mass. 302, 80 N. E. 462.

Action under Massachusetts Statutes must be brought

within two years for a taking of a right to take ice from a pond, *Carville v. Commonwealth*, 192 Mass. 570, 78 N. E. 735.

Jurisdiction. In Mississippi a justice of the peace in eminent domain proceedings has no judicial function to perform. He acts ministerially only, *Sullivan v. Yazoo & M. V. R. Co.*, 85 Miss. 649, 38 S. 33. In Mississippi the right of eminent domain is not enforceable in equity because the special tribunal created by Code 1892, c. 40, has exclusive jurisdiction, *Mobile J. & K. C. R. Co. v. Hoyer*, 87 Miss. 571, 40 S. 5. Where in Tennessee proceedings to condemn land by a railroad have been in the circuit court it has full and complete jurisdiction and the owner of land sought to be condemned cannot maintain a bill in the equity court for an injunction on the ground that the amount of the damages to be recovered will depend upon the number of railroad crossings, *Dixon v. Louisville Ry. Co.*, 115 Tenn. 362, 89 S. W. 322.

Defences. Defence that the corporation is not a public corporation may be raised in equity, see *post* §130. *Indiana Acts 1905*, p. 61, c. 48, section 5, as to objections by a defendant in eminent domain proceedings upon the ground either that the plaintiff has no right to invoke the power of eminent domain or that the court has jurisdiction, construed, *Vandalia Coal Co. v. Indianapolis & L. Ry. Co.*, 168 Ind. 144, 79 N. E. 1082.

Pleading. In a proceeding to condemn land the petitioner must ascertain the title to the premises and state it in his petition. If less than a fee simple it should be stated, *Sanitary Dist. of Chicago v. Pittsburgh, Ft. W. & C. Ry. Co.*, 216 Ill. 575, 75 N. E. 248. *Indiana Acts 1903*, pp. 92, 94, c. 36, giving a street or interurban railroad power to condemn land construed in connection with *Acts 1905*, p. 60, c. 48, providing for the proper allegations in a complaint to condemn land for a right of way, *Mull v. Indianapolis & C. Co.*, (Ind. 1907) 81 N. E. 657. A petition for the condemnation of land for a telephone right of way which asked for "the right to trim such trees as may be necessary to protect said line from interference" is insufficient within N. Y. Code Civ. Proc., section 3360, subd. 2, which requires a specific description of the property to be taken, *Bell Telephone Co. v. Parker*, 187 N. Y. 299, 79 N. E. 1008.

Commissioners. Missouri Revised Statutes 1899, section 1266, authorizing the court to appoint commissioners to assess land damages in condemnation proceedings, construed, *Southern Illinois Bridge Co. v. Stone*, 194 Mo. 175, 92 S. W. 475. Illinois Local Improvement Act 1897, section 23, making the report of commissioners in condemnation prima facie evidence is constitutional, *Chicago Terminal Transfer R. Co. v. City of Chicago*, 217 Ill. 343, 75 N. E. 499. N. Y. Laws 1893, p. 325, c. 189, section 16, as to the confirmation of the report of commissioners of appraisal in condemnation proceedings, construed, *Daly, In re*, 189 N. Y. 34, 81 N. E. 560.

Sec. 127. Jury trial—Verdict—View.

Evidence of value of lands, see *post* §133.

Right to a jury. Under the Illinois Eminent Domain Law where a petition is filed to condemn several lots owned by different persons a separate jury trial should not be granted to each owner unless he shows a special reason therefor, *Martin v. Chicago & W. Electric Ry.*, 220 Ill. 97, 77 N. E. 86. Missouri Revised Statutes 1899, c. 12, article 7, section 1268, as to the report of commissioners in condemnation proceedings construed in connection with the Missouri Constitution 1875, article 12, section 4, as to a right to a jury in such a case, *Southern Mo. Ry. Co. v. Woodard*, 193 Mo. 656, 92 S. W. 470. Right to a jury is granted by the Missouri constitution, *St. Louis M. & S. E. R. Co. v. Drummond Realty & Investment Co.*, 205 Mo. 167, 103 S. W. 977. Where land is condemned for a street widening, the landowners have a right to a decision of the amount of damages by jury trial according to Revisal 1905, s. 2588, *Durham v. Rigsbee*, 141 N. C. 128, 53 S. E. 531. Sess. Laws 1905, p. 84, c. 55, relating to the compensation for a taking by right of eminent domain and providing for the award of damages by the jury was construed, *City of Seattle v. Park*, 42 Wash. 151, 84 Pac. 644.

Jurymen. In Louisiana although a jury of freeholders in an expropriation case are chosen as experts and may therefore consider their own information outside of the evidence submitted they should not be charged to disregard the evidence in the case, *Shreveport v. Youree*, 114 La. 182, 38 S. 135. In expropriation proceedings the jury should be

taken from among persons who not only have no pecuniary interest in the controversy but have taken no specially active steps toward the object sought to be accomplished by the expropriation, *Louisiana & A. Ry. Co. v. Moseley*, 115 La. 757, 40 s. 37. The method of summoning a jury to determine the compensation for premises sought to be taken in condemnation proceedings is prescribed by Laws (Washington) 1905, p. 270, c. 146, which repealed Ballinger's Ann. Codes, & St. s. 5640. A judgment based upon a verdict of a jury not so summoned will be reversed upon appeal by the owner of the premises, although he waived a jury trial and was defaulted, *Oregon R. & Nav. Co. v. McCormick*, (Wash. 1907) 89 Pac. 186.

Verdict. Shannon's Tennessee Code sections 1858-1861 as to the jury's report in eminent domain proceedings construed, *Eldridge v. Overton County R. Co.*, (Tenn. 1907) 98 S. W. 1051. A railway in an action against it for damages through negligently maintaining a ditch along its right of way is entitled to have the jury find specially whether the injury be permanent or temporary, *Louisville & N. Ry. Co. v. Whitsell*, 31 Ky. Law Rep. 76, 101 S. W. 334. In condemnation proceedings, an instruction as to the form of a verdict leaving the amount of compensation blank and then providing that "we, the jury, find no other property will be taken or damaged" was erroneous because it amounted to an instruction that no damage was in fact done to land not actually taken, although there was evidence that would have justified a verdict allowing such damages, *Chicago Terminal Transfer R. Co. v. City of Chicago*, 217 Ill. 343, 75 N. E. 499.

View. Where the jury took a view and the damages allowed were within the range of values testified to, the verdict, not being the result of passion, undue influence, or other causes, will not be disturbed for inadequacy, *Pullman Co. v. Chicago*, 224 Ill. 248, 79 N. E. 572. In condemnation proceedings instructions which would authorize the jury to disregard the evidence in court and base their finding upon their view of the premises alone, were erroneous, *Chicago Ry. Co. v. Mines*, 221 Ill. 448, 77 N. E. 898.

Sec. 128. Appeal. Ky. St. 1903, section 839, as to appeals in condemnation proceedings, construed in *Madisonville H. & E. Ry. Co. v. Ross*, 31 Ky. Law Rep. 584, 103 S. W.

330, and in *Kotheimer v. Louisville & I. R. Ry. Co.*, (Ky. 1905) 89 S. W. 104. Louisiana Civ. Code articles 2634 and following as to appeals by plaintiffs in expropriation proceedings, construed, *New Orleans Terminal Co. v. Firemen's Assn.*, 115 La. 442, 39 S. 437. A general provision of law for allowing appeals after the time allowed does not apply to an appeal under a special statute for land taking, *Stapleton v. Macomb Circuit Judge*, (Mich. 1908) 114 N. W. 1029.

A writ of review is the proper remedy under the statutes of the state of Washington by which to review an order of condemnation on the question whether the contemplated use is a public use, *State ex rel. Padgett v. Superior Court of Pierce County*, (Wash. 1907) 89 Pac. 178. The question of the necessity for the exercise of the right of eminent domain is exclusively legislative; that of the necessity for the condemnation of the specific property is subject to review by the court, *City of Grafton v. St. Paul, M. & M. Ry. Co.*, (N. D. 1907) 113 N. W. 598. In eminent domain proceedings a bill of exceptions containing all the evidence given at the trial in court, with a record otherwise complete, is sufficient to present to a reviewing court the question of the weight of the evidence, although the jury took a view, *Zanesville, &c., R. Co. v. Bolen et al.*, 76 Ohio 376, 81 N. E. 681. In Missouri although a railroad in eminent domain proceedings pays the amount of the commissioner's award into court and the owner takes the money either party may file exceptions to the award. Under the constitution either party may have a jury to reassess the damages, *St. Louis M. & S. E. R. Co. v. Drummond Realty & Investment Co.*, 205 Mo. 167, 103 S. W. 977.

Loss of right to appeal. The right to a dismissal upon appeal in proceedings to condemn land because of the failure of the appellee to execute an appeal bond is not waived by a prior motion to dismiss on other insufficient grounds where the case was not submitted to the appellate court upon the merits, *Franzman v. Louisville & I. R. Ry. Co.*, (Ky. 1905) 89 S. W. 105. In accordance with Mississippi Constitution, Article 3, section 17 and sections 1693 and 1696, Code 1892, in eminent domain proceedings the applicant who is dissatisfied with the award of the lower court jury cannot appeal and at the same time proceed to appropriate the property, pending the appeal, without payment of the award to the owner, and, if it appropriate the land pending its own appeal, it shall

be considered to have waived its right to appeal, *Helm & N. W. R. Co. v. Turner*, 89 Miss. 334, 42 S. 377.

Sec. 129. What may be taken. Certain historic sites and buildings are exempted from the operation of the law of eminent domain as exercised by corporations by Pa. Laws 1907, No. 156. Louisiana Act No. 84, p. 106, of 1882 as to the right to build a railroad through land owned by the state, construed, *Friedrichs v. New Orleans, B. & T. Co.*, 114 La. 95, 38 S. 32. Although the resolution of a board of directors of a railroad provided for the taking of land 40 feet in width, it was not sufficient to support the return made by condemnation commissioners for the assessment of damages on land of the defendants for 41 2-10 feet as the commissioners exceeded their authority by taking over 40 feet, *Johnson v. Phila., B. & W. R. Co.*, (Del. 1905) 62 Atl. 86. Under *Hurd's Rev. Ill. St.* 1903, p. 1437, which provides that a railway may take a right of way 100 feet wide "and for the purpose of cuttings and embankments to take as much more land as may be necessary for the proper construction and security of the railway," a strip outside the 100 foot limit may be taken for the purpose of using the extra earth to fill in on the "cut", and also to secure proper drainage, *Prather v. Chicago Southern R. Co.*, 221 Ill. 190, 77 N. E. 430.

Sec. 130. Restraining proceedings. Where the directors of a levee district had filed a petition to condemn land and appealed from the judgment therefor and pending the appeal had entered on the land the landowner was not entitled to maintain an action of trespass. His remedy was to restrain the board from entering without first paying or depositing the money awarded as compensation, *Board of Directors v. Redditt*, 79 Ark. 154; 95 S. W. 482. A private party may enjoin a railroad from entering and constructing a railroad over his land if the company has not complied with the law by taking proper proceedings to condemn the land by right of eminent domain, and it is unnecessary to claim irreparable injury or that the company is insolvent, *State v. Caretta Ry. Co.*, (W. Va. 1907) 56 S. E. 520. Equity had no jurisdiction over eminent domain proceedings in *Dixon v. Louisville Ry. Co.*, 115 Tenn. 362, 89 S. W. 322. Proceedings for the condemnation of land for a railway right of

way may not be stayed, pending a suit involving the title to the land by the alleged owners, *Richmond & P. Electric Ry. Co. v. Seaboard Air Line Ry.*, 103 Va. 399, 49 S. E. 512, citing authorities. A lessee of land who by mistake was not made a party to condemnation proceedings and whose rights the railroad had not intentionally violated could not enjoin the railroad's use of the land where it paid into court a sum sufficient to satisfy such claim and proceed diligently to condemn his right, *Nelson v. N. J. S. L. R. Co.*, (N. J. Eq. 1907) 67 Atl. 1032. Where a railroad, believing that a satisfactory settlement for taking the complainant's land for a tunnel could be reached, delayed condemnation proceedings and worked up to his line before he brought a bill for an injunction, the railroad, being willing, ready and able to pay compensation and only intending to tunnel through rock 50 feet below the surface, will not be enjoined from so doing if they pay into court a satisfactory sum to guarantee the complainant just compensation, *Menge v. Morris & E. R. Co.*, (N. J. 1907) 67 Atl. 1028.

Defences. Kirby's Arkansas Digest sections 2947 et seq. as to petitions by a railroad to condemn land presuppose the existence of such a right in the petitioner, and the defendant landowners cannot contest his right at law by setting up that the petitioner is not organized to carry on a public railroad. But the defendants raising such a defence should be allowed to amend their answers by asking for equitable relief and the cause should then be transferred to the proper Chancery Court, *Mountain Park Ry. Co. v. Field*, 76 Ark. 239, 88 S. W. 897. When a company holds a charter giving it the power of eminent domain a party whose land is sought to be condemned cannot in the Mississippi Court of Eminent Domain challenge the company's right upon the ground that they are not organized for a public purpose. That court is one of limited powers and the only question before it is that of damages. Since the constitution, however, forbids taking private property except for a public purpose, but neither it nor the statutes provide a tribunal to try such a question, it must be determined by the chancery court upon a bill for an injunction, *Vinegar Bend Lumber Co. v. Oak Grove & G. R. Co.*, (Calhoon, J., dissenting,) (Miss. 1907) 43 S. 292.

Sec. 131. Compensation—In general. Code W. Va. Ch. 42, Sec. 18 and 20, relative to payment for land taken, are amended by W. Va. Acts 1907, Ch. 74. An act providing for dividing a county into two judicial districts is not unconstitutional because the records of one district are required to be kept for five years in a bank vault, thus providing for the taking of property without due process of law, since if the owner were unwilling they could be kept in a temporary courthouse, *Pryor v. Murphy*, 80 Ark. 150, 96 S. W. 445,

Sec. 132. Compensation as prerequisite to taking. See Board of Directors v. Redditt, 79 Ark. 154, 95 S. W. 482. Indiana Acts 1901, section 5, authorizing street railway companies to exercise the power of eminent domain and providing for a deposit of the compensation, construed, *Ft. Wayne, &c., Traction Co. v. Ft. Wayne & W. Ry. Co.*, (Ind. 1907) 80 N. E. 837. A railroad and logging company does not have the right to enter on land and commence building the road until after payment for the land taken; See Revisal 1905, s. 2575, *State v. Wells*, 142 N. C. 590, 55 S. E. 210. Cities which have taken land for municipal purposes are authorized to take possession immediately upon paying to clerks of court where proceedings for assessment of damages are pending, the sum awarded by commissioners by Mo. Laws 1907, p. 118. A bill lies to enjoin the defendant railroad from taking, injuring or destroying the plaintiff's property by eminent domain before paying compensation therefore, without regard to the solvency or insolvency of the defendant or the adequacy or inadequacy of legal remedies, *Southern Ry. Co. v. Hayes*, (Ala. 1907) 43 S. 487. Where the defendant in good faith but without legislative authority or municipal consent, built and later operated a third elevated track by means of which the plaintiff's abutting land was greatly depreciated, the court in its discretion might properly refuse to order the track removed, but enter a money judgment with an injunction against its maintenance in front of the plaintiff's house unless within 60 days the defendant paid the judgment, *Knoth v. Manhattan Ry. Co.*, 187 N. Y. 243, 79 N. E. 1015.

Sec. 133. Measure of damages—Elements—Time—Benefits set-off.

Evidence of damages, see *post* §160.

As to damages to abutting owners by construction and maintenance of railroads in streets, see *post* §§224-227.

Proper elements of damage. As to damages and evidence on taking of a livery stable for approach to a bridge, see *Rauch v. City of Cedar Rapids*, 134 Ia. 563, 111 N. W. 1027. It is very doubtful whether a diminution in the value of the premises for mortgage is to be taken into account, *Pierson v. Boston Elec. Ry. Co.*, 191 Mass. 223, 77 N. E. 769. Inconvenience due to loss of a home and the necessity of moving are not elements of damage in eminent domain proceedings, *Madisonville H. & E. R. Co. v. Ross*, 31 Ky. Law Rep. 584, 103 S. W. 330. Under Rev. Codes 1905, Ch. 36, a railroad company whose lands are taken for a public street is entitled to compensation for the diminution in value of its exclusive right to the use for railway purposes of the property sought to be condemned, *City of Grafton v. St. Paul, M. & M. Ry. Co.*, (N. D. 1907 113 N. W. 598. If the taking of a piece of land dividing a farm caused increased danger to the stock and also increased the liability of fire, the jury may consider these elements in awarding damages although they do not amount to separate elements of damage, *St. Louis E. R. & W. Ry. Co. v. Oliver*, 17 Okl. 589, 87 Pac. 423. If the docks and wharves belonging to a steamship company had been condemned, the company was not entitled to damages because of loss of wharfage where no evidence had been introduced to show that any revenue had been derived from this source, and damages on account of the loss of the company's right to dock and anchor vessels had been allowed, *Mayor, &c. of Baltimore v. Baltimore & Phila. S. Co.*, (Md. 1906) 65 Atl. 353. The market value of property condemned by right of eminent domain does not consist of its speculative value, or of its particular value for public use as for a school, but the market value is what the property would sell for to a man of prudence, and the jury should determine its value taking into consideration the testimony of those familiar with real estate valuations, *Guyandotte Valley Ry. Co. v. Buskirk*, 57 W. Va. 417, 50 S. E. 521. Damages may be awarded for all consequential damages arising from the erection and maintenance of a telegraph line, after proof has been produced by which a reasonable estimate can be made; the amount assessed on the land appropriated is by law purely compensatory, *Postal Telegraph Cable Co. v. Peyton*, 124 Ga. 746,

52 S. E. 803. If a road is built through a farm by right of eminent domain which does not give it any new means of access or confer special benefits on the property by facilitating cutting it up into house lots as there are other roads coming to the farm which can be extended so as to cut the property up into lots very advantageously, it is error not to grant damages for the injury to the property in its operation as a farm by requiring new fencing and on account of the inconvenience of operation, etc., beside the recompense for the actual value of the land taken, *Williamson v. Read*, 106 Va. 453, 56 S. E. 174.

Damages according to most likely use of property. Where the plaintiff's witness testified that the right of way taken by the defendant railroad was wide enough for six tracks but the land was in the country and no evidence was offered that six tracks would ever be laid it was error to instruct the jury to assess the damages upon the most injurious use of the right of way possible, not that most likely, *Chicago R. Co. v. Kline*, 220 Ill. 334, 77 N. E. 229.

Time as of which damages are estimated. An instruction to the jury was erroneous which was to the effect that they might take the value at what "it might reasonably be expected to be worth in the near future," *Chicago Ry. Co. v. Mines*, 221 Ill. 448, 77 N. E. 898. In eminent domain proceedings the value of the property must be estimated at the time of the taking and not as of a time before the public improvement was proposed, deducting, however, the increase in value due to the improvement, *Opelousas, &c., Ry. Co. v. St. Landry Cotton Oil Co.*, 118 La. 290, 42 S. 940. Mass. Rev. Laws, c. 50, section 3, which provides that damages for land taken for a highway shall be fixed at the value before laying out the highway, construed, *Boston Chamber of Commerce v. Boston*, 195 Mass. 338, 81 N. E. 244. Where a petition for condemnation of the defendant's land was filed in 1902, but he was never served and no further prosecution had until 1906, and in the meantime the land had greatly increased in value, upon the petitioner's insisting that the value of the land be determined as of the date of the filing of the original petition the court properly granted the defendant's motion to dismiss for lack of prosecution, *Sanitary Dist. of Chicago v. Chapin*, 226 Ill. 480, 80 N. E. 1017. Under the authorization of the state, a railroad company sought to condemn a

strip of land that had been used by another railroad company for many years and recovered by the defendants through ejectment for default in payment secured by a deed of trust on the land. Under this deed the property was acquired as it existed at that time, and an instruction basing the sum to be recovered upon the value of the land at the time of the construction of the railroad was properly refused, *Newport News & O P. Ry. & Electric Co. v. Lake*, 105 Va. 311, 54 S. E. 328. Although the right of a pier owner to an exclusive use of the pier as a shedded pier, and to be relieved of the burden of having vessels put in at the wharf was not beyond legislative repeal or modification, as at the time it was taken by the city by right of eminent domain no such repeal had been made, the value of the property was to be estimated under the existing conditions of the law, *In re Pier Old No. 15, East River, N. Y., New York v. Morris*, 185 N. Y. 607, 78 N. E. 531.

Benefits set-off. In condemnation proceedings for a railroad right of way it was a question for the jury whether the erection of a depot one quarter of a mile from the defendant's land constituted any special benefit to him. Various instructions given the jury, though erroneous, were harmless in view of all the evidence, *St. Louis Ry. Co. v. Stewart*, 201 Mo. 491, 100 S. W. 583. In a taking by right of eminent domain the jury may consider whether a safe approach to a mill over a viaduct instead of the former grade crossing is not to be considered as an offset to the damage to the mill by the closing of the grade crossing, although it is somewhat longer by the new viaduct, *Robbins v. City of Scranton*, (Pa. 1907) 66 Atl. 977. In eminent domain proceedings to determine the damages, if any, to land not taken any benefits which actually enhance the market value of such property are to be considered as special benefits and deducted, even although they are common to other land in the vicinity, *Peoria, B. & Co. Traction Co. v. Vance*, 225 Ill. 270, 80 N. E. 134. Under Mass. St. 1894, p. 764, c. 548, section 8 owners of land in a street and abutters, in an action against a street railroad, must set off all benefits which might be the subject of an assessment of betterments if the railway were a public improvement built under a statute at the city's expense, *Peabody v. Boston Elevated Ry. Co.*, 191 Mass. 513, 78 N. E. 392. In railway condemnation proceedings the possible increase in

value of land for commercial and quarrying purposes is not a special benefit to be set off against the damages to be paid to the owner, *In re Mantorville Ry. & Transfer Co.*, (Minn. 1907) 112 N. W. 1033. In condemnation proceedings for a railroad right of way the fact that the company has taken a conveyance of land nearby from a third party for a depot and elevator does not constitute a special benefit which must be credited to the company, *Illinois Ry. Co. v. Borms*, 219 Ill. 179, 76 N. E. 149. The benefits conferred on a farm by the building of a road through it cannot be set off against the damages where the road was of no particular benefit in the improvement of the farm or otherwise beyond the benefit to all the land in the neighborhood, *Williamson v. Read*, 106 Va. 453, 56 S. E. 174.

Land not taken. Under Mass. Statutes 1894, c. 288, sec. 5, one whose land is damaged by the taking of other land for a public use may recover his damages even though no part of his land is taken, *Whitney v. Commonwealth*, 190 Mass. 531, 77 N. E. 516. Where in eminent domain proceedings there was evidence that the tract taken was part of a larger tract although the latter was crossed by two roads it was proper to allow the jury to find that it was in reality all one tract and to assess the damages on the basis of the depreciation in value of the whole, *St. Louis M. & S. E. R. Co. v. Drummond Realty & Investment Co.*, 205 Mo. 167, 103 S. W. 977. When in condemnation proceedings it appeared that a party owned one tract of land under a chain of title describing it as "on the Mississippi River," and also an island under a chain of title describing it as "in the Mississippi river" and the evidence showed that the river ran between the two tracts, it was held that the island tract should not have been taken into consideration by the jury in assessing damages for taking a strip of the other land, *St. Louis R. Co. v. Aubuchon*, 199 Mo. 352, 97 S. W. 867.

Quarry. In eminent domain proceedings the owner of land on which there is a quarry, cannot establish its value as personal property separate from the land, *St. Louis B. & T. R. Co. v. Cartan Real Estate Co.*, (Mo. 1907) 103 S. W. 519. When a quarry is taken by eminent domain the measure of damages is the value of the stone in the quarry, and it is not the value of the stone after it has been manufactured nor

the amount of the profits after manufacturing, *Cole v. Ellwood Power Co.*, (Pa. 1907) 65 Atl. 678.

Sec. 134. Measure of damages on taking for railroad right of way. A railroad company relocated its tracks so as to occupy a public highway passing by the plaintiff's grist mill, and the railroad changed the location of the highway so the plaintiff's mill was made more difficult of access for his customers and his business was ruined. The railroad was liable for damages, although none of the plaintiff's land was taken, *Foust v. Penn. R. Co.*, 212 Pa. 213, 61 Atl. 829. The owner of land granted a right of way to a railroad on condition that the railroad should build a passenger station on the land and double track the road over the land. But as the road was a freight and not a passenger railroad, the benefit to the owner in case of compliance with these conditions was nothing and no further damages for breach of the condition were allowed. Although the owner had obtained a forfeiture of the right of way for failure to comply with the conditions of the deed, the railroad could obtain the land by regular condemnation proceedings, *Baltimore & N. Y. R. Co. v. Bouvier*, 70 N. J. Eq. 158, 62 Atl. 868.

The true rule. The measure of damages allowed for the taking of land is the market value and the damage resulting to the owner's remaining land from the building of the road across it, and from flood or overflows caused by the construction of the same. *Pine Bluff Ry. Co. v. Kelley*, 78 Ark. 83, 93 S. W. 562. The owner of premises abutting on a way (not included in his deed) may recover, for the construction of a railroad on the way, only such damages as are "reasonably permanent in their character" and such as arise from the operation of the road in the usual way; those within the control of the railroad company would be excluded, *Keyser v. Lake Shore, &c., Ry. Co.*, 142 Mich. 143, 105 N. W. 143. In estimating the damages reference should be had to the use for which the property is suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the immediate future, *Metropolitan St. Ry. Co. v. Walsh*, 197 Mo. 392, 94 S. W. 860. In proceedings to condemn land for a railroad right of way an instruction that in estimating the damages to land not taken the jury should consider the depreciation in value for any

present or future use to which the land might conveniently or lawfully be put, was erroneous because the only uses which could be properly considered were those which affected its present market value, *Chicago & A. Ry. Co. v. Staley*, 221 Ill. 405, 77 N. E. 437. In expropriation proceedings by a railroad to secure a right of way the criterion of value is the market value at the date of the suit, in view of any use to which it may be applied, and of all the uses to which it is adapted, exclusive of any increase in value given by the construction of the railway. Market value is the fair value between one who wants to buy and one who wants to sell, under usual and ordinary circumstances. It does not mean speculative value, *Opclousas, &c., Ry. Co. v. Bradford*, 118 La. 506, 43 S. 79. What adjoining owners will pay for a tract cut in two by a railroad is immaterial, the true test being the fair cash market value of the whole tract, neither can a witness willing to buy the land testify as to what he will give for it. An instruction which authorizes the jury to take into consideration probable injury due to the growth of weeds on the right of way, the inconvenience and danger of teams being frightened by passing engines and cars, and the danger of fire from the operation of trains by steam cars is erroneous because it is calculated to mislead the jury to believe that these elements of damage are to be considered as independent of, and additional to, the depreciation in value after the construction of the railroad, *Chicago Ry. v. Kelly*, 221 Ill. 498, 77 N. E. 916.

Elements to be considered. When a railway company locates its line along a public street, depreciating by reason of noise, smoke, dust cinders etc. the value of the adjacent property these elements of damage should be considered by a jury; mere inconvenience or discomfort to the occupants of adjacent property are not elements of damage, and are not to be considered in estimating their amount, *Atlantic & B. Ry. Co. v. McKnight*, 125 Ga. 328, 54 S. E. 148. A witness in condemnation proceedings for a railroad right of way may take into consideration in forming his opinion as to the damages the possibility of fire from passing trains as affecting the market value of the premises taken, *Illinois Ry. Co. v. Ring*, 219 Ill. 91, 76 N. E. 83. A jury in awarding damages for the taking of land for a railroad right of way should give the landowner the reasonable value of the land taken, the reason-

able cost of fencing made necessary by the building of the road, the depreciation of the whole tract due to its separation into parcels or because of reasonable fear of fire due to the operation of the road, the inconvenience of the owner in crossing the track to his land on the other side, and the discomforts to residents due to smoke, etc., caused by the locomotives, *Shirley v. Southern Ry. Co.*, (Ky. 1905) 89 S. W. 124. The depreciation in the value of land remaining, after a taking for a railroad right of way, due to the danger of fire from locomotives, may be considered by the jury as an element of damage, *St. Louis Belt & Terminal Ry. Co. v. Mendousa*, 193 Mo. 518, 91 S. W. 65. Where land used for a brick kiln is taken the jury might consider the hindrance to further development by the construction of new kilns, the feasibility of a switch track to the plant, and the depreciation due to danger of fire set by locomotives owing to special exposure, *St. Louis, M. & S. E. R. Co. v. Continental Brick Co.*, 198 Mo. 698, 96 S. W. 1011.

Damage to farm—crops—stock. In proceedings to condemn a railway right of way through a stock farm the increase in risk of loss by fire and increased danger to the live stock may only be considered in so far as they may actually affect the market value of the land not taken by the railroad, *Chicago Southern Ry. Co. v. Nolin*, 221 Ill. 367, 77 N. E. 435. The liability that crops would be set on fire by a railroad can only be considered to the extent to which it affects the market value, *Eldorado, etc., Ry. Co. v. Everett*, 225 Ill. 529, 80 N. E. 281. The cutting of fields into inconvenient shapes, the interruption of convenient ways for animals to pass from the farm buildings to and from pasture, and the necessity for additional fencing are elements of damage and may be properly inquired into in eminent domain proceedings for a railroad right of way, *New Jersey I. & I. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420. In eminent domain to acquire a right of way for an interurban trolley line damages from danger to the person or stock of the owner of the land taken, are too remote, uncertain, and speculative to be considered. Under Illinois Acts 1903, p. 426, c. 227, such railroads are required to fence their right of way, *Indianapolis & Cincinnati Traction Co. v. Larrabee*, 168 Ind. 237, 80 N. E. 413. In estimating the damage on the remainder of a farm not taken in eminent domain proceedings when the railroad

did not actually cut off access to the farm buildings from other parts of the farm the value of the land without any buildings whatever was too remote for consideration. The jury having taken a view and their verdict having been within the range of the testimony their verdict was not disturbed. There having been several persons whose land was being taken and some of them, such as life tenants and lessees, having had a less interest than a fee the jury were properly instructed to "keep in mind the interest to be taken in the lands," *Prather v. Chicago Southern Ry. Co.*, 221 Ill. 190, 77 N. E. 430. An award of \$10,000 damages in an eminent domain proceeding by a railroad was ordered cut down to \$6,800. In such a case the fact that the laborers would stop to look at the trains, the mules run away and the live stock be killed in the future on the track, are not elements of damages, *Yazoo Ry. Co. v. Jennings*, (Miss 1907) 43 S. 469. When a farm has been cut in two by a railroad so there is more difficulty in getting to various portions of the farm, causing separation of water facilities and improvements, and necessitating greater watchfulness while work with horses near the railroad, all these facts may be considered in estimating the difference in the market value of the farm before and after the taking by the railroad, *Arkansas Valley & W. Ry. Co. v. Witt*, (Okl. 1907) 91 Pac. 897.

Remoteness. Where a residence was located on a corner and after one railroad had been built on one street another was built on the other the owner could not recover in eminent domain proceedings by the latter for damages due to the fact that the intersection of the road compelled the old road under the statutes to stop its trains and give signals in front of the house, *Bracey v. St. Louis, S. F. & N. O. R. Co.*, 79 Ark. 124, 95 S. W. 151.

Sec. 135. Conveyance of land pending proceedings to condemn it. Where a street is used for interurban purposes without a formal taking, but afterward a formal taking is made, the owner of abutting land at the time of the taking, not the owner at the time of the beginning of the interurban use, is entitled to damages, *Wilbur Lumber Co. v. Milwaukee Light, Heat and Traction Co.*, (Wis. 1908) 114 N. W. 813. When a railroad placed its tracks with the consent and at the request of the owner of the fee the landowner's own right

was to damages which do not run with the land or pass by a later conveyance thereof. A subsequent purchaser takes subject to the burden of the road and will be enjoined from interfering with its operation, *Nittany Valley R. Co. v. Empire Steel & Iron Co.*, (Penn. 1907), 67 Atl. 349. A claim for damages by reason of the location of a street railroad in front of promises numbered 1354 and 1358 Washington Street accruing before the execution of a will by the owner devising "all the real estate at 1354 and 1358 Washington St.—together with all the personal property connected therewith consisting of horses, carriages, carts, furniture, fixtures, the good will in the business, all stock in trade—the same now used in part as a bakery and dwelling house" does not pass under the devise but goes as intestate property, *Schell v. Schuler*, 194 Mass. 441, 80 N. E. 523. Easements of light, air, and access, appurtenant to real property abutting upon a public street or highway, are inseparable from the dominant estate, and upon a conveyance of the latter, such easements pass to the grantee, notwithstanding the grantor's attempted reservation of the same, or of any rights of action for the invasion or destruction thereof; although such a reservation is ineffectual to create a trust in such easements, it does create a resulting trust, by virtue of which the grantee becomes a trustee for his grantor as to all moneys received or judgments recovered for the invasion or destruction of such easements. Where, therefore, a railroad company with knowledge of a conveyance containing such a reservation has settled with the grantee and taken from him a release, the rights of the grantor, at law at least, are extinguished and in the absence of affirmative fraud in which the railroad was actually concerned the rights of the grantor are only against the grantee, *McKenna v. Brooklyn R. Co.*, 184 N. Y. 391, 77 N. E. 615. A buyer of the interest of a litigant, whose title is in dispute, and the property itself being subjected to condemnation, may be admitted as a party defendant in such proceedings, *Eddleman v. Union County Traction & Power Co.*, 217 Ill. 409, 75 N. E. 510.

Sec. 136. Rights of mortgagees and tenants. Under Rev. Stat. 1898, Sec. 1848 and 1853, the taking of part of an estate subject to a mortgage gives the mortgagee an interest in the money paid as damages to land not taken as well as that

for the land taken, *Stamnes v. Milwaukee & S. L. Ry. Co.*, (Wis. 1906) 109 N. W. 100. In Massachusetts the right of a mortgagee to maintain a petition for the assessment of damages for the taking of mortgaged property for a public use is dependent entirely upon statute (Rev. Laws, c. 48, section 114). A mortgagee who has not taken possession under his mortgage, but has entered the land and taken off stone under a license from the mortgagor, has no such possessory title as will authorize him to maintain a petition for assessment of damages upon the theory that he is the owner, *Taber v. Boston*, 190 Mass. 101, 76 N. E. 727.

Tenants. Where a portion of a lot subject to an irredeemable ground rent renewable forever, is taken by the state under the power of eminent domain, the rent may be apportioned and reduced by a suitable commission, such as the Burnt District Commission, and the owner of the ground rent may also be recompensed for the diminution of rent. For a full discussion, see *Mayor of Baltimore v. Latrobe*, 101 Md. 621, 61 Atl. 203. A tenant's term is "property" under Comp. Laws, Sec. 4244, relative to damages for land taken by the abolition of grade crossings, *City of Detroit v. C. H. Little Co.*, 141 Mich. 637, 104 N. W. 1108. Where a railroad obtained a right of way from a landlord and ordered a construction company to enter it the railroad was liable to the tenant for damages done by the construction company to the tenant's crops although they were planted after he knew the right of way had been granted by his landlord, *Ft. Smith Suburban Ry. Co. v. Maledon*, 78 Ark. 336, 95 S. W. 472.

Lessee's interest. A decision that the city officials of Memphis could lease a certain public landing to individuals for private purposes established a rule of property as to that land. A railroad, therefore, which after the execution of a lease obtained from the city a license to build a railroad terminal thereon must proceed by eminent domain to condemn the lease and compensate the lessee, *Union Ry. Co. v. Chickasaw Cooperage Co.*, (Tenn. 1906) 95 S. W. 171.

Sec. 137. Payment of damages. Sec. 7598, Rev. Codes 1905, specifying time within which judgment must be paid is amended by N. D. Laws 1907, Ch. 108.

Sec. 138. Interest—Costs—And fees.

Interest. The plaintiff whose land was taken by eminent domain is entitled to interest from the date of the order of condemnation, *Snowden v. Shelby County*, (Tenn. 1907) 102 S. W. 90.

Costs and fees. As to payment of costs and expenses when the owner of land condemned for an educational or penal institution fails to recover more than was offered him by the officers of the institution, see *Ariz. Laws of 1907*, Ch. 91, Sec. 3, amending Tit. XXI, § 2466 (Sec. 23), Rev. Stat. of 1901. Sec. 2020, Gen. Stat., relative to payment of costs of proceedings in eminent domain is amended by *Fla. Laws 1907*, Ch. 5707. As to the amount of counsel fees allowed a defendant in eminent domain proceedings when the petition is dismissed, under *Illinois Laws, 1897*, p. 218, see *Chicago Traction Co. v. Flaherty*, 222 Ill. 67, 78 N. E. 29. *Hurd's Illinois Rev. St. 1905*, c. 47, p. 10, which provides that if the petitioner in eminent domain proceedings fails to take the land sought to be condemned the defendants shall be entitled to counsel fees, construed, *Deneen v. Unverzagt*, 225 Ill. 378, 80 N. E. 321. Under Code, Sec. 2007, attorney's fees and costs on appeal are not taxable, *Woodcock v. Wabash Ry. Co.* (Ia. 1907) 113 N. W. 347. When the plaintiff in a suit for damages because of the condemnation of a right of way across the plaintiff's land refused a written offer by the railroad to allow judgment to be entered against it for a certain sum, he was liable for all costs accruing after the offer was made, when he was not awarded a larger amount than he had refused, according to *Wilson's Rev. & Ann. St. 1903*, s. 4715, *Blackwell E. & S. W. Ry. v. Bebout*, (Okl. 1907) 91 Pac. 877.

Sec. 139. Loss of rights acquired by eminent domain.

The forfeiture of lands taken by eminent domain in case of non-user or failure to pay damages is provided for by *Ind. Laws 1907*, Ch. 184, amending Sec. 10 of Act of Feb. 27, 1905. Abandonment for railroad purposes does not divest a title acquired by a railroad in fee, *Enfield Mfg. Co. v. Ward*, 190 Mass. 314, 76 N. E. 1053. A landowner who has received the damages assessed for condemnation of a portion of his land for a highway cannot restore his rights to the land taken by returning the money, without the consent of the county, *Brooks, Neely & Co. v. Yell County*, 76 Ark. 67, 88 S. W. 590.

ESCHEAT

Sec. 140. When escheat takes place—Aliens. When land held by aliens contrary to law may escheat to the state, see *ante* §22. Proceedings to be taken by the attorney general and by parties claimant in case of escheated estates are prescribed by Cal. Stat. 1907, Ch. 253, making a new Title VIII of Part III of the Code of Civil Procedure. Kentucky Constitution, section 192, and Kentucky Statutes 1903, sections 567 and 2971, as to escheat of lands owned by corporations construed, *Commonwealth v. Chicago St. L. & N. O. R. Co.*, (Ky. 1907) 99 S. W. 596. Ch. 11, Secs. 60 and 62, Gen. Laws, prescribing the procedure under petitions for the release of escheated lands, are amended by N. Y. Laws 1907, Ch. 613. Various New York Statutes as to escheat in the case of non-resident alien heirs construed, *McCarmock v. Coddington*, 184 N. Y. 467, 77 N. E. 979. Arts. 1821, 1822, 1823 and 1830 of Tit. XXXVIII, Rev. Civ. Stat., providing when estates shall escheat to the state, amended by Tex. Laws 1907, Ch. L. Escheats are regulated by Wash. Acts 1907, Ch. 133. Where a native of Scotland came to Indiana in 1861 and while a resident thereof took title to certain land in that state, later removed to Alabama and after living there about twelve years returned to Scotland, it not being known whether he intended to come back to the United States when he returned to Scotland the Court would not presume as a fact that at the time of his death he was domiciled in Scotland, so that his lands in Indiana would escheat to that state rather than pass to his alien heirs, *Donaldson v. State*, 167 Ind. 553, 78 N. E. 182.

ESTATES

Co-tenancy, see *post* TENANTS IN COMMON AND JOINT TENANTS.

By entireties, see *post* §254.

Conflict between the granting and the habendum clause in a deed, see *ante* § 82.

Estates invalid as perpetuities, see PERPETUITIES.

Estates created by will, see further *post* §643.

Conditions in will in restraint of alienation or marriage, see *post* §652.

See LANDLORD AND TENANT.

Sec. 141. Creation of a fee. Illinois Rev. Sta. 1874, c. 30, section 13, which provides that all conveyances shall be deemed to be in fee simple unless a less estate is limited in express words, construed, *Pease v. Davis*, 225 Ill. 408, 80 N. E. 249. A conveyance by the owner of a half interest in fee and the owner of a half interest for life with remainder over, purporting to carry a fee, gives the grantee his title subject to the shares of the remaindermen on partition, *Board of Levee Com'rs v. Nelms*, 84 Miss. 642, 37 So. 116. The plaintiff's father conveyed to her for life, with remainder to her children living at her death and the issue of any deceased children and if she died without lawful descendants to his sons or the survivor and the issue of deceased sons, intending in fact to give her a fee. The sons, who had living issue, later made a deed to her, while still childless, which purported to be of a fee, and she then sued the son's and her father's widow and executor and obtained a decree reforming the original deed so as to convey a fee. It was held that her rights being adverse to her own unborn children and the son's children, neither of whom were represented in or concluded by the decree, her title was not marketable in fee, *Downey v. Seib*, 185 N. Y. 427, 78 N. E. 66. A deed conveyed property to A as trustee for B, the wife of the grantor, which provided the property should be held in trust for her use during her life, and that A the trustee should execute a deed to a purchaser upon a written request made by C, and on the further trust that it should revert to her husband or his heirs if she had not conveyed the property during her life. Under these provisions the deed passed an equitable estate in fee simple to C, *Morgan v. Morgan*, 60 W. Va. 327, 55 S. E. 389. When the habendum was to the grantee for life, "and after her death to the use of the children of her body begotten, in fee tail forever" and the grantee had two children, a son who died before her in infancy, and a daughter who survived but died without children, under Ward's Illinois Rev. St. 1905, c. 30, the surviving daughter took a fee simple; (it being the policy of the law

that estates should vest at the earliest period possible, and the entailment of estates be prevented,) *Dick v. Ricker*, 222 Ill. 413, 78 N. E. 823.

Executors. A title conveyed by patent to executors of an estate and "to their heirs and assigns forever" gives them an estate in their personal not official capacity, *Sanborn v. Loud*, (Mich. 1907) 113 N. W. 309.

Power. Alabama Code 1896, section 1046, which provides that an absolute power of disposition, unaccompanied by a trust, given to a tenant for life or years under certain circumstances converts the estate into a fee simple, construed in connection with sections 1052 and 982, being part of the statute of frauds as to land, *Rutledge v. Crampton*, (Ala. 1907) 43 S. 822.

The words "heirs" is a word of limitation where it is not used to describe individuals but to designate heirs generally or the whole line in succession. It is not to be construed as a word of purchase unless there are other controlling words showing an intention of that kind by the person using it, and if it is used as a word of limitation, its effect is to mark out the estate granted, *Ortmayer v. Elcock*, 225 Ill. 342, 80 N. E. 339. A deed to the grantee "his children and assigns forever" conveyed a life estate which was converted into a fee simple by Missouri Rev. St. 1899, section 4590, which does away with the necessity of the word "heirs," *Tygard v. Hartwell*, 204 Mo. 200, 102 S. W. 989. In a case governed by the statute, Code §1329, that states "Any limitation by deed," &c., shall be construed as creating and marking out an estate, the words in a deed "to the heirs of A" (a living person,) shall make such deed a valid deed to his children, *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201.

Sec. 142. Attempted limitation on fee. When the testator left the following will: "All the rest, residue and remainder—I devise—to my wife to have and to hold the same in fee simple forever. But in case of the death of my beloved wife, it is my will that all the estate then remaining and not disposed of by her by a last will or other writing shall pass to my brother and my sister—or their heirs in equal parts:" it was held that the wife took a fee simple and the limitation over was void, *Bernstein v. Bramble*, 81 Ark. 480, 99 S. W. 682.

Sec. 143. Life estates—Creation.

As to the creation of a life estate by exception or reservation in deed, see *ante* §83.

A deed "to them and the survivor of them, their heirs and assigns forever" gives a moiety to each grantee for life with remainder to the survivor in fee, *Finch v. Haynes*, 144 Mich. 352, 107 N.W. 910. A statutory form of deed quitclaiming real estate contained no habendum but a provision that after the death of the grantor and grantee the premises should be divided between their sons. Held—Grantee took a life estate, *Adams v. Fisher*, 143 Mich. 673, 107 N.W. 705. Where a residuary clause read as follows: "I agree, devise, and bequeath absolutely and in fee simple to my wife. . . . for life, after her death to be equally divided between any three heirs," naming them, the widow took only a life estate, *Wallace v. Bozarth*, 223 Ill. 339, 79 N.E. 57. A bequest of money to be invested in land by the executor for the testator's niece and to be conveyed to her "to be held by her during the term of her natural life, and after her death to the heirs of her body forever" operated as an equitable conversion of the fund into land under which the niece took a life estate and upon her death without issue the estate went to the heirs of the testator, *Webb v. Sweet*, 187 N.Y. 172, 79 N.E. 1024. Under a deed the grantors were given the right to remain on the premises rent free for the rest of their lives, and they had taken out coal from the land for 15 years, two-thirds of that time without dispute. A coal company claiming under the grantee could not dispute the life interest of the grantor in the coal on the property or his right to the coal, *Robb v. N. Y. & C. G. Coal Co.*, (Pa. 1907) 65 Atl. 938. When the granting clause in a deed read as follows: "In consideration of love and affection, I do hereby give, grant, sell, convey and confirm unto E. M. R. for and during her natural life, with reversion to myself or assigns after her death: and the habendum clause: "To have and to hold the said house and lot to said E. M. R. for and during her natural life as her own separate, free from any and all debts or liabilities of her husband; but after the death of my said wife the said property shall revert to me, if living, or, if dead, to my heirs:" the wife took a life estate and upon the death of the grantor, the children took by inheritance and not by purchase, *Dooley Goodwin*. (Ky. 1906) 93 S.W. 47. A deed of trust pro-

vided that the income of a one-quarter interest should be paid for life to the grantor's son A and after his death "to the use of the children living, free, clear, and discharged of the trust," and although provision was made that any sums advanced should be charged against the share of any of the beneficiaries, the share of A was only a life estate and A's creditors could not collect their claims from the shares of A's sons in the remainder as the income was all A was entitled to receive, *Jacob Tome Institute v. Shipley*, 102 Md. 642, 62 Atl. 1042.

Heirs. The testator devised half of his farm to his daughter, "and if she should have no heirs to the oldest son of A if he should have any lawfully begotten at her death; if she should have no male heirs it is to descend to all her heirs alike except to A himself. But shall not prohibit his heirs from receiving his part." This was construed as passing only a life estate to the oldest son of A in one-half of the farm and he was not seised of said real estate in fee simple, *Reed's Estate, In re*, (Del. 1906) 64 Atl. 822. When a deed read as follows: "This indenture witnesseth that have bargained and sold unto R. S. T. with this intention, and this deed of conveyance, to be deeded to the present wife of R. S. T., and if she has no living heirs at her death to revert back to R. S. T.'s nearest heirs;" Mrs. R. S. T. took a life estate with a remainder in fee to her daughter, provided she survived her mother, *Ex Parte Porter*, (Ky. 1906) 97 S. W. 391.

Bodily heirs. A deed to a brother and sister "jointly for and during their natural lives, without power to alienate or convey, with remainder to their bodily heirs, forever," gave the grantees each a life estate in one half, in accordance with Ky. St. 1903, s. 2345, *Jones v. Carlin*, (Ky. 1906) 96 S. W. 885. It was held that a deed which conveyed land to the grantor's son "during his natural life and at his death to descend and go to his body heirs, if any, or his nearest blood" vested in the son only a life estate and his body heirs took the remainder in fee upon the contingency of their surviving their father. The conveyance is governed by Kentucky Statutes of 1903, section 2345, *Clubb v. King*, (Ky. 1907) 99 S. W. 935. A husband and wife conveyed a piece of real estate to a trustee and a reconveyance from him allowed the beneficial use of the property by the wife, providing that it should not be encumbered except by a joint conveyance by

herself and husband and that it should vest in her children on her death. The wife, however, had no power to convey the property in fee simple after her husband's death and such a conveyance only passed a life estate, *Barnett v. Piercy*, 149 Cal. 178, 86 Pac. 603. Where a trustee, a testator, gave a sum of money to a trustee for his daughter and empowered him "to invest said money, at her request, in land, to be deeded to (the daughter) and the heirs of her body, at her death, if she leave any, and if she have none, (the money) or the land it may have been invested in, to descend to my legal heirs equally," the daughter took a life estate in the land when bought, with a remainder in fee to her children who took under the will and not as heirs of their mother, and her husband took no interest whatever, *Reeves v. Morgan*, (Ky. 1907) 100 S. W. 836. Where a testator in one clause devised his house to his wife for life, by a second devised the remainder to a trustee "for the sole and exclusive use and benefit" of his son and provided therein that the trustee "shall at least annually, and oftener, if necessary, pay over to "the son" the net proceeds arising from the use of said property, and upon the death of the "son" said property shall descend to the heirs of his body, or in default of said heirs, to his nearest relatives by consanguinity only as if he were a single man and in the manner provided by the laws of descent," and by a final clause provided that all other property of which I shall die seised and possessed shall be divided equally between my daughter—and my son": it was held that upon reading the whole will together it was clear that the testator gave the son only a life estate rather than a fee tail convertible by statute into a fee simple. Such life estate may be sold by the son's trustee in bankruptcy for the payment of his debts, *Adair v. Adair's Trustee*, (Ky. 1907) 99 S. W. 925.

Sec. 144. Life estate—Sale. Chancery Act Revision 1902, § 60, (P. L. 531, 532) relating to the payment of a lump sum to the holder of a life estate, was construed, *Leach v. Leach*, (N. J. Ch. 1907) 66 Atl. 595. Where a life tenant has power to sell for reinvestment of the proceeds no obligation devolves upon the purchaser to see that the reinvestment is in fact made, *Whitfield v. Burke*, 86 Miss. 435, 38 S. 550. A husband who allows land devised to him for life with remainder to his children to be foreclosed by the mortgagee

to whom he has conveyed it to secure money for the payment of debts of his wife's estate, instead of paying the debts from the personality, and then buys it back, takes it for the benefit of the children as remaindermen, *Lewis v. Wright*, 148 Mich. 290, 111 N. W. 751. Where a testator gave his estate to his wife for life except as "hereinafter mentioned" and in a later clause directed that "what remained of the estate" be transferred in part to a grandson and the balance to certain other heirs, the widow only took a life estate in the personality and having invested it in realty in her own name the beneficiaries were entitled to have deeds made by her, purporting to convey in fee, cancelled and the titled vested in her for life with a remainder in them, *Vanatta v. Carr*, 223 Ill. 160, 79 N. E. 86.

Sec. 145. Rights and liabilities of life tenant—Taxes.

A life tenant may not use a tax title purchased by him against the right of the remainderman, *First Congregational Church of Cedar Rapids v. Terry*, 130 Ia. 513, 107 N. W. 305. Where a life tenant's husband borrows money on the notes of himself, his wife, and a possible remainderman and uses the money to improve the property the notes ought not to be paid from the proceeds of the property on its sale for re-investment, *Frederick v. Frederick's Adm.* (Ky. 1907) 102 S. W. 858. Kirby's Arkansas Dig., section 7132, as to liability of life tenant to remainderman for failure to pay taxes, construed, *Magness v. Harris*, 80 Ark. 583, 98 S. W. 362. It was held that "aside from any statute on the subject, it is the duty of a life tenant to pay current taxes on lands, and the failure to discharge such duty is an act of waste for which the remainderman may recover any amount paid out by him in satisfaction of the tax lien, but it does not authorize a recovery by the remainderman of the lands held in life tenancy," *Magness v. Harris*, 80 Ark. 583, 98 S. W. 362.

Sec. 146. Estates tail—Creation—Destruction by statute and deed. A deed to "H and her two children B and C and any succeeding heirs of her body", with an habendum "to H and her children, and their heirs and assigns forever," passed an interest to H's children who were born after its execution, *Southern Ry. Co. v. Hayes*, (Ala. 1907) 43 S. 487. When land was conveyed to a wife for life with remainder in the heirs of her body and the wife during her

life time joined with two of her children in a conveyance to a third person who later took conveyances from two other children, the third person acquired the life estate of the wife and the interest in remainder of such of the other grantees only as survived their mother, *Clark v. Sires*, 193 Mo. 502, 92 S. W. 224.

Statutes converting fee tail into fee simple. A deed running to the grantee and "her bodily heirs" passes a fee tail by statute converted into a fee simple unless upon the face of the instrument it appear that it was intended to make the children of the grantee tenants in common with their parent, *Edins v. Murphree*, 142 Ala. 617, 38 S. 639. It was held that a will which provided that after the death of testator's wife his real estate be equally divided among his children the share of one daughter to descend "to her bodily heirs" gave the daughter a fee tail which by Kentucky Statutes, section 2343 of 1903, was converted into a fee simple, *Edwards v. Walesbury*, (Ky. 1906) 98 S. W. 306. Under a deed from a husband to his wife "and the heirs of her body begotten by me" she took an estate tail which Shannon's Tennessee Code, section 3673, converted into a fee simple, *Speight v. Askins*, (Tenn. 1907) 102 S. W. 74.

Barring estates tail. Equitable estates tail may be barred in the same manner as legal, R. I. Laws 1906, Ch. 1346. General Laws 1896, c. 201, s. 16, concerning the right to bar equitable estates tail, was construed, *Paine v. Sackett*, 27 R. I. 300, 61 Atl. 753.

Sec. 147. The rule in Shelley's Case. Rule in Shelley's Case abolished by Ia. Laws 1907, Ch. 159. A devisee for life and after that "to his legal heirs to do with it as they see proper" takes a fee simple according to the rule in Shelley's Case, *Garver v. Clouser*, (Penn. 1907) 67 Atl. 909. A devise "to have and to hold during his lifetime and after his death to descend to his heirs" in accordance with *Doyle v. Andis*, 127 Ia. 36, 102 N. W. 177, gives a fee, *Brokaw v. Brokaw*, (Ia. 1907), 113 N. W. 469. A devise to testator's widow, "and to her heirs and assigns forever, but if she gets married again, then at the time of her second marriage one-half.....to be sold and divided" among certain persons, coupled with another clause as follows: "if my.....wiferemain my widow, she is to have and to hold the whole

estate.....for her own support until her death, and after her death the residue shall be divided among the above named persons", gave the widow a fee under the rule in Shelley's Case and upon her death without remarriage her heir too, *Risman v. Wierth*, 220 Ill. 181, 77 N. E. 108. A conveyance to one during his natural life, and to the heirs of his body and their assigns in fee simple forever is controlled by the Rule in Shelley's Case and the application of the rule is not affected by provisions in the deed that the wife of the grantee should have no other privilege than that of living on the premises for life, and no longer, and that the grantee should place no incumbrances on the premises, *Kepler v. Larson*, 131 Ia. 438, 108 N. W. 1033.

Under a will devising to three daughters and a grandson "share and share alike" the share of the latter to vest in the daughters "and the survivor or survivors of them, in trust.....with power to sell and convey, in their discretion, for the education of my grandson, during his minority anduntil he attains the full age of twenty-five years", and at that time to pay his share over to him, with a gift over to the daughters if he die before that time without issue, the devise to him was not within the rule in Shelley's case, but gave him a fee with a valid executory devise to the daughters. A bill by the trustees for leave to sell the land contrary to the will which failed to allege that although it was then vacant it could not be rented did not state a case justifying a sale in order to conserve the minor grandson's interest. The property having been appraised at \$21,000, a sale to the trustees within 30 days for \$16,000 paid for by receipting for their shares and that of the minor, not in cash, could not be sustained, *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163. Where in accordance with an agreement between a widow and her children for distribution of the decedent's land the children executed a deed to her in which the granting clause read as follows: "Grant, bargain, and sell unto the said party of the second part, her heirs and assigns,.....during her natural lifetime" and the habendum "To have and to hold—unto the said party of the second part, her heirs and assigns during her natural life time" the rule in Shelley's Case was not applicable, and the widow took merely a life estate, *Miller v. Mowers*, 227 Ill. 392, 81 N. E. 420.

Sec. 148. Remainders—Vested and contingent—Classes—Ratification of void sale.

Vested. A devise to a wife during her lifetime and at her death all the property remaining to a son gives the son a vested remainder subject to sale on execution, *Jonas v. Weires*, 134 Ia. 47, 111 N. W. 453. A testator devised the remainder of his property to his widow for her support during the minority of his youngest child at the end of that time she was to have one-third of his estate during the rest of her life; the remainder, two-thirds, to be divided among his children. Held—the widow took an estate for years terminating on the death of the youngest child just before majority, and a life estate in one-third thereafter, subject to which the children took a vested remainder, *Shafer v. Tereso*, 133 Ia. 342, 110 N. W. 846. Where a will devised one-half to the testator's widow and her heirs to hold, use and manage during her life, remainder to testator's son if he survived her, and the other half to the son and his heirs to have, hold, use and manage in his discretion "during his natural life" and in case the wife survived the son his property should belong to her, the widow and son each took an estate for the life of the one who might first die, with cross determinable fees in remainder, the survivor taking in fee simple, *Tebow v. Dougherty*, 205 Mo. 315, 103 S. W. 985. When a husband and wife made a trust deed, the income to be paid to the wife for life and after her death to the husband for life, and upon his death the principal to be paid to their children in such sums as the husband should appoint and in default of appointment to them equally, except as against existing creditors, or those in specific contemplation in the immediate future, the remainder vested at once in fee in half the real estate, expectant upon the equitable life estate of the widow, *Storrs v. Burgess*, (R. I. 1907) 67 Atl. 731.

Contingent. Kentucky Statutes 1903, ss. 2328, and 2329, permitting remaindermen to sue life tenants for waste are not applicable to a contingent remainderman, *Taylor v. Harvey*, (Ky. 1907) 100 S. W. 258. Laws 1899, c. 300, authorizing sale of future contingent estates, construed, *In re Kingston's Estate*, 130 Wis. 560, 110 N. W. 417. When a deed ran to a married woman and "to such child or children as she may have by her husband George—at the time of her death, or to the descendants of any such, if any such descendants there

should be": she took a life estate and her children a defeasible fee, subject to be defeated by their death prior to their mother's death. The contingent remaindermen are such descendants of her deceased children who may be alive at her death, *McCready v. Morris*, (Ky. 1906) 94 S. W. 24. Under a will which provided that the trustees should pay out such sums as were necessary for the support and nurture of the widow and minor children and at her death the trust cease and the residue be equally divided among the survivors of the children, the issue of deceased children taking their parent's share, the children took a contingent remainder which did not vest until the widow's death, *Brechbeller v. Wilson*, 228 Ill. 502, 81 N. E. 1094. Where a trust under a will was for the benefit of a wife and daughter and upon the death of both of these, in case there should then be no living descendants of the testator, the principal was to be distributed among the testator's own right heirs, the interest of the latter was contingent and vested in those who answered that description upon the happening of the contingency, *Boston Safe Deposit & Trust Co. v. Blanchard et al.* 196 Mass. 35, 81 N. E. 654. Under a will devising "the rents, use and possession, for and during his natural life," to the testatrix's husband and after his death to three named persons with a proviso that in case of the death of either of the three "prior to the death of my husband or prior to my decease leaving a child or children", then the latter or their descendants "shall inherit the share..... which would have vested in their parents" the remainder to the three was contingent and did not become vested because they received a conveyance of the life tenant's interest. Partition among them, therefore, would be ordered only as to the life tenant's interest, *Cummings v. Hamilton*, 220 Ill. 480, 77 N. E. 264. When the owner of land conveyed it to a trustee for the benefit of the owner for life, "and for her heirs after her death, if she died intestate as to said property, but subject to any disposition she may choose to make of the whole or any part of the property by her last will.....or by deed in the nature of a last will" she took only a life estate with a contingent remainder in her heirs but did not reserve any reversion in her. She therefore was not able to convey a fee simple in her life time to a stranger, *Frank Fehr Brewing Co. v. Johnston*, (Ky. 1906) 97 S. W. 1107. A devise was made to trustees for the use of a son and his wife by the

terms of which part of the income was to be paid to the testator's wife and the residue to several persons including the son and wife "but if the said (wife) is divorced from my son or after his death shall marry again, she shall not receive any portion of such rentals, but "they shall be divided among the other persons.....named, share and share alike,..... but if any of the children of "my son and his wife" shall die leaving children, the share of such deceased child shall be paid to its children, and if any of their said children shall die without descendants, the share of such deceased child shall be distributed equally among the other beneficiaries..... After the death of my said wife and son and the death or marriage "of his wife, and when all of the above-named children have reached the age of twenty-one years, the trust hereby created shall terminate and said lands shall vest in fee simple absolutely in the said now living children of my son—and his present wife, and their descendants, share and share alike, the descendants of any of said above named children taking the share of their parents." The remainder was held contingent because limited to dubious and uncertain persons. A conveyance of the interest of all of the grandchildren and of the son's widow after the death of the testator and his wife did not operate as a merger of the life estates and contingent remainders during the widowhood of the son's wife, *Brownback v. Keister*, 220 Ill. 544, 77 N. E. 75.

Class. By a will devising separate life estates in real estate to three sons, and at their death "to go to their respective children as a class in remainder", the child of a deceased daughter of his son was not allowed a share in the remainder. For a full discussion, see *Cawley v. Kendrick*, 122 Ga. 183, 50 S. E. 41.

Ratification of void sale. When a father holding land as a life tenant with remainder to his sons, sold the land assuming to be trustee for his heirs and invested the proceeds in other land under a void order of the court, and his heirs on coming of age were told the facts of the case and assumed possession of the tracts which had been bought in this manner, their taking possession was equivalent to ratification of the sale and they could not recover from the purchasers their remainder interest, *Hicks v. Webb*, 127 Ga. 170, 56 S. E. 307.

Sec. 149. Conditions.

Construction of. Where a will created a life tenancy under the express condition that "the land be not at any time, under penalty of forfeiture, subject to any liens or incumbrances of any kind by the reversioners" it was held that the provision was not broad enough to prevent the life tenant's interest therein being disposed of by him, or from being subject to the payment of his debts against his will, *Flaherty v. Stephenson*, 56 W. Va. 192, 49 S. E. 131. Plaintiff conveyed land to the defendant for railway and station purposes; if the company failed, for a period of one year, to maintain a "station", the land was to revert to grantor. After maintaining a station for 17 years, the company, for more than a year, maintained no agent of any sort and transacted no business but kept the station open and stopped trains there. Held—Plaintiff entitled to possession of the land, *Hamel v. Minn., &c., Ry. Co.*, 97 Minn. 334, 107 N. W. 139. A and B conveyed certain lands contiguous to a railroad to the N. E. R. R. Co. by a deed containing the condition subsequent, viz: "provided that should said strips of land cease to be used for railroad purposes it shall revert" to the grantors; the railroad company conveyed to C, who in turn conveyed to the B. R. & A. R. Co. became its president and divided one of the strips of land, devoting one part as a depot portion and one for a residence for himself, a fence dividing the two portions. The divisions of the strip by C, or his recognition of the division made by others, segregating that which was used for railroad purposes, and devoting the remaining portion to uses wholly foreign to the purposes expressed in the condition of the deed, thus subverting the intention of the grantor, neither he nor those claiming under him, who are not using the property for railroad purposes, are in a position to assert that the condition was indivisible; there has been a breach of the condition and a right of entry has accrued to A and B. Cases fully cited. *Moss v. Chappell*, 126 Ga. 196, 54 S. E. 968.

No condition created. A devise of a house to a church "to be used as a parsonage and nothing else, and to be kept for that purpose and used for nothing else" with no devise over creates no condition, *Adams v. First Baptist Church of St. Charles*, 148 Mich. 140, 111 N. W. 757. A deed executed on December 2, 1898, for which part of the consideration was

the "building, equipping and putting in operation a line of railroad. . . . to be completed January 1, 1899, did not impose upon the grantee a condition subsequent but merely a covenant to complete the road on January 1, for the breach of which a suit for damages might be brought, *Bain v. Parker*, 77 Ark. 168, 90 S. W. 1000. A deed conveyed to a railway company "forever for railroad and depot purposes" a certain tract of land. The railway company leased a part of the tract to persons who constructed buildings thereon which were used for other than railway purposes but still retained the fee in said land, leaving no interest to the grantor save the right to prevent a use different from that mentioned in said deed. The provision in said deed being a covenant running with the land, the breach thereof not entitling the plaintiffs to recover rents or rental value gave at most only the right to enjoin the use and to bring an action for damages for the breach of such covenant, *Gaffney v. Wood*, 74 S. C. 323, 54 S. E. 573.

Conditional limitation. A deed conveying property in trust for the grantor for life, on his death for the benefit of A and B, and on the trustee's death the property to vest in A, one-half for herself and the other half in trust for B and in case either should die without issue of the body the whole should vest in the survivor, and if both should die without issue of their bodies, the whole should vest absolutely in the trustee or his heirs at law gives the trustee a conditional limitation over in case of the death without issue of both A and B, *Middlesex Banking Co. v. Field*, 84 Miss. 646, 37 So. 139.

Condition subsequent. A deed was to be null and void if the grantee failed to make semi-annual payments during the life of the grantor. Held—this is a condition subsequent on breach of which the premises reverted in grantor, free from a mortgage placed by the grantee, *Minneapolis Threshing Mach. Co. v. Hanson*, 101 Minn. 260, 112 N. W. 217.

Enforcement. Ballinger's Ann. Codes & St., s. 5500, were construed to allow a grantor of real estate to regain possession of the premises when a condition in the deed was broken, which provided that the grantor should have a right to recover possession of the premises if a saloon were opened on the land conveyed, and an actual entry before bringing an action of ejectment was unnecessary, *Lewiston Water &*

Power Co. v. Brown, 42 Wash. 555, 85 Pac. 47. A deed was given conditioned not to become an absolute conveyance until the death of the grantors, and then only in case the grantees and their heirs and assigns furnish the grantors with "room, food, clothing, fuel, and all necessities of life.....proper to their station in life, during their remaining life." The grantees entered and occupied the premises, but did not carry out the condition. In an action to cancel the deed the court treated the deed as valid, found that the condition was not complied with, and ordered the property reconveyed to the surviving grantor upon payment of \$240 paid by the grantees for taxes and improvements, *Johnson v. Paulson*, (Minn. 1908) 114 N. W. 739. A grantor in a deed granted a certain piece of property to the city to be used as a public park and as a site for a library, the city "to take and enjoy the rents and income therefrom until such reasonable time as the same shall be devoted to the purposes aforementioned. Another clause which provided that the premises should be used for the purposes above mentioned and that the conveyance was made on that express condition, did not render the land liable to forfeiture in case it were not devoted to the purposes specified within a reasonable time, but the deed created a trust which was not liable to forfeiture at the instance of the grantor or any of his heirs. By proceedings in equity the enforcement of the trust might be compelled, *Ashuelot Natl. Bk. v. City of Keene*, (N. H. 1907) 65 Atl. 826.

Penalty not enforceable. A covenant in a deed by the grantees not to build a livery stable is valid but a further clause providing that the property shall revert in case the grantees do build such a stable is in the nature of a penalty and not enforceable, *Klasener v. Robinson*, (Ky. 1907) 100 S. W. 255.

Excuse for non-performance. A deed was given of land on the condition that the grantee should support the grantor during the rest of her life, but the heirs of the grantor prevented the grantee by force from carrying out his contract, nevertheless the grantee was allowed the land, *Harwood v. Shoe*, 141 N. C. 161, 53 S. E. 616.

Waiver of breach. A grantor in an unrecorded deed to the trustees of a school district which provided for a reverter to the grantor in case the trustees failed to maintain

theron a schoolhouse who made no objection to its relocation there after the school had been removed from the lot after a delay of several years, waived his right to claim a forfeiture, *Trustees v. Patrick*, (Ky. 1907) 102 S. W. 237. A condition subsequent in a deed of land that on failure of the grantee to maintain a fence the land should revert to the grantor is waived by grantor's acquiescence for 12 years in the removal of the fence, *McCue v. Barrett*, 99 Minn. 352, 109 N. W. 594.

Sec. 150. Merger of estates.

Merger of estates of mortgagor and mortgagee, see *post* §380.

A conveyed two parcels of real estate to B reserving a ground rent on each parcel, and B deeded to C, and C mortgaged the properties to A, who foreclosed the mortgage and took possession of the property, and the fee and the ground rent became merged in him, so that a subsequent mortgage given without express reservation of the ground rents covered them as well as the fee. A year afterwards A entered into a written declaration in which he stated that he would hold these ground rents in trust for D, but D was charged with notice as the records showed that the ground rents had been merged in A and the whole subsequently mortgaged. The trust declaration subsequent to the mortgage did not affect the mortgagee's interest as he did not know of it and the declaration of trust was void against the mortgagee as regards the ground rents, *Frank v. Guarantee Trust & Safe Deposit Co.*, 216 Pa. 40, 64 Atl. 894.

ESTOPPEL

Sec. 151. Estoppel by deed. A buyer who resold and had the purchaser take a deed direct from the original owner is estopped to rely upon a prior deed given him by the owner, *Burger v. Allen*, (Ky. 1905) 89 S. W. 542. After a life tenant executed a deed to the remaindermen, her right to appoint a new trustee after the death of the first, and make a sale of the property as granted in the will was lost by the deed to the remaindermen, *Rosier v. Nichols*, 123 Ga. 20, 50 S. E.

988. If A represents to a broker, that he will make a deed of a certain property to his wife, and then he receives money, secured by a security deed to the property, by such representations, he is estopped from setting up his own title, *Clark v. Havard*, 122 Ga. 273, 50 S. E. 108. When a will devises the estate to his son A as trustee for his sons B and C, leaving a life estate to the widow, she conveys a valid title when she signs a deed with the remaining heir, and she is estopped from claiming otherwise, *Kornegay v. Miller*, 137 N. C. 659, 50 S. E. 315. Stepsons who have received from their step-mother, who was a childless second wife of their deceased father, a general quitclaim deed of lands inherited by her from him, and executed thereon a warranty mortgage for full value, are estopped from thereafter claiming any interest in the land as against the mortgagee, *Griffis v. First Nat. Bank, Connersville*, 168 Ind. 546, 81 N. E. 490. A will grants an estate for life to the widow and makes her executor of the will and contains the clause: "I order and direct that none of my real estate be sold by my wife or by my heirs, or disposed of in any way during her natural life." But the heirs may sell land and if they give a warranty deed for it, the title is valid, as they would be estopped from bringing suit by the warranty clause, *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785. The complainants were creditors secured by a senior deed of trust to an undivided one-half of certain lands, and in settlement of their claim accepted and recorded a warranty deed to the same premises. Before the execution of this warranty deed the defendant's grantor accepted a deed to an undivided one-half therein from a trustee in junior deeds of trust, and prior thereto he had taken from the original owner a conveyance of the other half. In a later settlement between the defendant's grantor and the debtor the former gave the latter no credit for the interest conveyed by the trustee's deed and he later for years occupied the premises as tenant in common with the complainants, recognizing their title in every way and claiming only a half interest therein. In his conveyance to the defendant that was all he intended to convey. It was held that after the statute of limitations had run against the enforcement of complainant's deed of trust the defendant's grantor would be estopped to claim a legal title under the deed of trust as against the complainant, and the defendant having bought with knowledge of the complainant's claim and

that her grantor only intended to convey a one-half interest to her, is also estopped, *Dickson v. Sledge*, (Miss. 1905) 38 S. 673.

When a wife conveyed a house and lot to her husband and subsequently executed a deed of trust to secure a loan, and the deed of trust provided that the property should be reconveyed to the wife on payment of the loan, it did not estop the husband from claiming the property as against her heirs although he had not recorded her deed to him and the record title was still in her, *Tyler v. Currier*, 147 Cal. 31, 81 Pac. 319. The agreement of a claimant to a tract of land to satisfy a lien thereon is no reason for holding that the claimant is estopped from setting up title thereto, *Equitable Loan & Security Co. v. Lewman*, 124 Ga. 190, 52 S. E. 599.

Of grantee of deed. A purchaser of part of a section does not by accepting a deed thereof admit his grantor's title to the remainder although the latter claimed under a deed which purported to convey the whole section, *Choate v. Southern Ry. Co.*, 143 Ala. 316, 39 S. 218. After a tract of land has been surveyed and a deed has been drawn up, and the grantor has notified the grantee of a mistake in the survey and deed by which 1.54 acres were not included in the deed and survey, the grantee was estopped from claiming the extra acreage if he elected to purchase under the deed as first drawn up, *Williams v. Virginia-Pocahontas Coal Co.*, 60 W. Va. 239, 53 S. E. 923. When a husband executed but never delivered a deed to his wife and the land descended to her and his children the latter are not estopped from asserting their claim therein as against a grantee from her alone who took in ignorance of the husband's deed, *Ligon v. Barton*, 88 Miss. 135, 40 S. 555. When persons who were in possession of land claiming it as their own took quit claim deeds from persons asserting a claim thereto it is held that they were not estopped to deny that such persons had in fact no title. Such an act was not a recognition of title on the part of the claimants "but was in fact buying their peace," *Holderman v. Holderman*, (Ky. 1906) 98 S. W. 277.

Heirs estopped. A deed executed by the widow and another as personal representatives of a deceased seller of land is of course void as to the seller's heirs, but estops one who claims as an heir of the widow, *Cope v. Blount*, (Tex. 1906) 90 S. W. 868. A testator left a will by which he gave to his

grandson a life estate in certain real estate with remainder to his lawful issue; in case of death without such issue the remainder was to pass to the lawful heirs of the testator. The life tenant incumbered the estate by deeds of trust and judgments and later joined with the remaindermen in a suit for partition; following which the parties to the suit consented to the decree which confirmed the sale of the real estate, which included the remainder, as well as the life estate. The testator's heirs were estopped from objecting that the sale as to them was not valid and binding, *Suburban Co. v. Turner's Adm'r*, 105 Va. 456, 54 S. E. 29.

Sec. 152. After acquired title—Feeding the Estoppel.

When the owners of a lode mining claim quitclaimed an undivided one-tenth interest in the claim and later after the lode claim was abandoned and forfeited acquired a new placer claim, the placer claim did not enure by estoppel or by force of Kirby's Arkansas Digest Section 734 to the grantees, *Wells v. Chase*, 76 Ark. 417, 88 S. W. 1030. Where the plaintiff knows that he is not the owner of a farm and by his positive acts induces the defendant to believe that he is the owner and grants permission to take away gravel in constructing a railroad, receiving part payment for it, he is estopped, when he has subsequently acquired an assignment from the bank which owned the property of all their rights in the gravel, from prosecuting the suit against the railroad under the said assignment, *Rogers v. Portland & B. St. Ry.*, 100 Me. 86, 60 Atl. 713. When a man gave a warranty deed of land he did not own and later purchased it from the state, the true owner, the legal title being conveyed by mistake or fraud to a third person, under Kirby's Arkansas Digest, section 734, the original grantee took the original seller's equitable title and the burden is upon the person to whom the state conveyed the legal title to show that he was a purchaser for value without notice, *Rozell v. Chicago Mill Co.*, 76 Ark. 525, 89 S. W. 469. When a mortgagee assigns the mortgage the assignor was not estopped from setting up her own title to the property when she subsequently purchased it, without any evidence of an intention to defraud being shown, especially when the deeds were recorded which proved that the mortgagor only had a lease of the property, *Tucker v. Tucker*, 72 S. C. 295, 51 S. E. 876. Where the plaintiff's grantor took a warranty deed of land which the pur-

chaser did not then own but which he later contracted to buy from the true owner the assignee of the latter contract who actually received a deed in pursuance of it from the true owner is not estopped to set it up as against the plaintiff, *Davis v. Denham*, 145 Ala. 247, 40 S. 277. When a sale is made of a three-eighths interest in land by three tenants in common and the deed does not state definitely what interest is sold by the grantors, or that the whole interest is not conveyed, the subsequent acquirement of a further interest in the land by one of the grantors inures to the benefit of the grantee, and parol evidence to show that only a three-eighths interest passed at the sale is not admissible, *Buchanan v. Harrington*, 141 N. C. 39, 53 S. E. 478. An action involved the question of title to land where in 1842 A the executor of B (later adjudged without title) made a deed to C, purporting to convey a one-half individual interest in all of the disputed land, "so far as the right and title of said premises is vested in him as executor as aforesaid." In 1848 the state issued to A individually grants to the land thus deeded. Held, that the deed under consideration amounted as far as the binding force of the warranty was concerned, to nothing more than a quitclaim deed, and the maker of the deed could acquire a title subsequently to the execution thereof, and would not be estopped from setting it up against his grantee, *G. S. Baxter & Co. v. Camp*, (Ga. 1906) 54 S. E. 1036.

Intervening lien. Where, before the execution of a mortgage which contained no express covenant of warranty except the statutory warranty of a fee simple free from incumbrances suffered by the mortgagor implied by the words "grant, bargain, and sell," the property had been sold upon an execution against the mortgagor, upon the title revesting in the mortgagor by the exercise of the statutory right of redemption it inured by estoppel to the mortgagee. As, however, at the time of redemption a third person furnished the money and the mortgagor agreed to give him a first lien upon the land as security for its repayment this lien constitutes an equity prior to the legal title vesting in the mortgagee by estoppel. One who later acquired title and possession claiming under the man who furnished the money for redemption must apply the rents and profits to satisfying the lien, *New England Mortgage Co. v. Fry*, 143 Ala. 637, 42 S. 57.

Sec. 153. Estoppel in pais. *Where a guardian accepts one-half the stipulated amount of oil as royalty for oil wells, the infant heirs are not estopped, when they reach their majority, from demanding their full share, Headley v. Hoopen-garner, 60 W. Va. 626, 55 S. E. 744.*

Disclaimer of title. When A owning land represents that it is the property of C, and induces B to buy from C, A is estopped from claiming the land as his own, even though he has a duly recorded title, *Brice v. Sheffield, 121 Ga. 216, 48 S. E. 925.* "One who stands by and induces another to purchase land upon the assurance that the title is all right, and that he does not claim it, will not afterwards be allowed to set up title to the land against the purchase made upon the faith of his declarations, *Bates v. Polly, (Ky. 1906) 97 S. W. 340.* A defendant in an action involving the title to land who in his answer disclaims any interest in the land is estopped from ever setting up any claim as against the purchaser at a sale in pursuance of the judgment subsequently rendered, *Stine v. Goodman, (Ky. 1906) 92 S. W. 612.* After the grantee, by informing the grantor that he has decided not to accept his deed and by destroying it, has induced him to execute a new deed to his wife, he will not be permitted to assert title under the prior deed, *Ames v. Ames, 80 Ark. 8, 96 S. W. 144.* Where a woman, by an oral statement denied ownership to certain land, she could not be estopped from claiming the land in controversy, as a disclaimer to the title of a freehold estate can only be made by deed or in a court of record, *McMurray v. Dixon, 105 Va. 605, 54 S. E. 481.* Eight years after an execution sale the execution creditor sued the purchaser and his father to set it aside and recover the land. In the sworn answers filed by the defendants it was averred that the purchaser was the owner of the land. These answers estop the father and those claiming under him, *Layne v. Layne, (Ky. 1906), 90 S. W. 555.* The chairman of the committee to obtain rights of way for a railroad, who was also a director in the road, had induced bondholders to purchase bonds by executing a mortgage on the right of way of the railroad, although he had never granted to the company his own land which the right of way of the railroad occupied. After the bondholders had taken the property he was estopped from bringing a suit for damages for the taking of his land $1\frac{1}{2}$ rods on each side of the railroad as his acts had induced the bondholders

to believe that the railroad owned the right of way although the county records showed that he held the title to the property, *Stubbs v. Franklin & M. Ry. Co.*, 101 Me. 355, 64 Atl. 625. When a director in a corporation owned a lien on property and the corporation granted a mortgage with a covenant of warranty on the property under which it was afterwards foreclosed, the director was estopped from setting up his own lien when he knew of the transaction, *Battery Park Bank v. Western Carolina Bank*, 138 N. C. 467, 50 S. E. 848. If a widow files a petition asking for authority to sell land of her husband's although she owns it herself as her deed to her husband was void, she is not estopped from claiming the land as her own as against the heirs, when her actions were the result of ignorance without intent to mislead, *Mullins v. Shrewsbury*, 60 W. Va. 694, 55 S. E. 736.

Accepting benefits. When a levee district sold a tract of land receiving therefor cash and notes "it does not lie in the mouth of the district, or those claimnig under it to deny the validity of the mode of performance on its part, *Book v. Polk*, 81 Ark. 244, 98 S. W. 1049. Parties who distributed Missouri land among themselves in accordance with the decree of an Ohio Court are estopped from asserting that the Court was without jurisdiction to render the decree. An infant party who upon coming of age ratifies such division is bound thereby, *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997. A mortgage deed was executed in blank and left with the attorney to fill in the description, but when the mortgagors paid the interest, received the benefit of the mortgage, and did not allege any defect in the mortgage until after the mortgage sale which they attended, their acts amounted to a ratification of the mortgage and they were estopped from impeaching the validity of the mortgage, *Carr v. McColgan*, 100 Md. 462, 60 Atl. 606. A landlord agreed with a tenant to submit all matters in controversy between them to arbitration. The landlord, dissatisfied with the action of the arbitrators, was given time to furnish proof as to certain items of account against his tenant, failing which, the arbitrators published the award and the landlord accepted the benefits under the award to which he would not be entitled otherwise. Under such circumstances the landlord is not entitled to question the validity of the award, *Harrell v. Terrell*, 125 Ga. 379, 54 S. E. 116. An attorney found the possible heirs of an estate and made a contract whereby he

was to receive reasonable compensation for his services and necessary expenses in recovering the estate, the total sum not to exceed one-half the value of the estate. Although he neglected to inform them of the size of the estate so they thought the attorney would not receive more than \$500 as a maximum, yet when the heirs approved of the attorney's work after they knew the size of the estate and allowed him to spend a large sum of money and a great deal of time in recovering the estate for them, they were estopped from claiming later that the contract was not valid, and the attorney was entitled to collect his charges in full after the property had been recovered for the heirs, *Adams v. Schmidt*, 68 N. J. Eq. 168, 60 Atl. 345. If minor children merely know of an illegal sale conveying their remainder, and they are supported by their father from the tracts of land bought with the proceeds of the sale, it does not constitute ratification of such a sale, and the remaindermen are at liberty to disaffirm it after the death of the life tenant, *Smith v. McWhorter*, 123 Ga. 287, 51 S. E. 474.

Allowing land to stand in the name of another. Where trustees of a town site property convey real estate to an individual in order to have a reconveyance made to them with correct plats, and the individual neglects to convey to them, and the property is attached by one of his creditors; the trustees are not estopped from setting up ownership, the attaching creditor not being able to show that he gave credit to the individual on the faith of his ownership of the property. Filing an intervening petition in the suit in which the attachment was made does not estop the trustees from bringing an independent action, where the trustees have never been actually allowed to come in as interveners. The court gave them leave to intervene upon payment of \$75. Not having paid, they were not in the case at all, *Hickox v. Eastman*, (S. D. 1908) 114 N. W. 706. After a husband has had title of premises and treated them as his own for 20 years his wife will not be permitted to claim that they are held in trust for her, as against the claims of those who have given credit to the husband relying on his ownership, *McCormick Harvesting Mach. Co. v. Perkins*, (Ia. 1906), 110 N. W. 15.

Compliance with request of party estopped. When a purchaser at a foreclosure sale agreed to sell land within a specified time, and he requested that tender of the purchase price be

postponed for a year, he was estopped from setting up the statute of frauds as a defense to enforcing the contract, *Alston v. Connell*, 140 N. C. 485, 53 S. E. 292. A landlord warned his tenant that he should not be entitled to the crops sown in the autumn and maturing after his tenancy had expired if he did not sow grass seed, saying that he would have himself to blame if it should prove that his right to the away-going crops should be defeated by his failure to sow grass seed, and the landlord came upon the farm during the sowing of the winter crops and expressed himself as satisfied when the tenant told him that he was sowing a peck of timothy to the acre. The owner was therefore estopped to claim that the tenant had no right to reap the crops as it was the evident understanding that the tenant could have the crops when the lease was made, *Carmine v. Bowen*, 104 Md. 198, 64 Atl. 932.

None in favor of wilful wrongdoers. After certain streets had been platted as an addition to the city, showing streets and alleys thereon, the owner remained on the property without removing the fences but always respecting the rights of the city to the streets and so instructing her lessees. Then the defendants purchased the land and the husband who managed the community property petitioned the city for a vacation of the street, but although the vacation was not granted, they built improvements on the streets, and then they could not plead an equitable estoppel against the city because they were wilful wrongdoers and the city was entitled to remove all obstructions from the streets, *Unzelman v. Snohomish*, 40 Wash. 588, 822 Pac. 911.

Adjoining parcel. When an award was made for the condemnation of a certain strip of land for a street and the plaintiff accepted the award, he was not estopped from claiming title to a strip between the strip condemned and the street, *Pinney v. Borough of Winsted*, (Conn. 1907) 66 Atl. 337.

No inducement for action given. Where a mortgagor made an agreement with the first mortgagee that certain insurance due the mortgagor should be applied on account of the mortgage and a subsequent mortgagee knew of the agreement, the subsequent mortgagee could not compel the prior mortgagee to apply the money to reduce the mortgage if the first mortgagee had made a subsequent agreement with the mortgagor to apply the money to reduce the indebtedness on a general account. The first mortgagee did not tell the second

mortgagee that the first mortgage was about to be reduced as an inducement to take the second mortgage and therefore there was no estoppel established, *Weidemann v. Springfield B. Co.*, 73 Conn. 660, 63 Atl. 162.

Sec. 154. Silence—Allowing improvements to be made.

A purchaser at a judgment sale is not estopped to claim the entire property levied on merely because he kept silent at the sale when a third person protested against it on the ground that the judgment debtor owned only a one-fifth interest therein, *Mansfield v. Johnson*, 51 Fla. 239, 40 S. 196. The failure of a son to disclose his ownership of a tract of land conveyed to him by his father at the time he takes the acknowledgment of a deed of other land executed by his father and mother, at which time it is said by others that the tract already conveyed would be left and on which the mother relied will not entitle her to maintain a suit to set aside the deed to the son, *Beechley v. Beechley*, Ia. 1906) 108 N. W. 762.

Allowing improvements to be made. One who allows a city to deposit earth on his lot for the support of a street is estopped after four years to remove it, *Williams v. City of Hudson*, 130 Wis. 297, 110 N. W. 239. City held estopped to deny title of railroad company to land claimed to have been purchased from the city after the company had spent large amounts in improving it, *Sioux City v. Chicago & N. W. Ry. Co.*, 129 Ia. 694, 106 N. W. 183. Where a woman seised of coal lands left a husband and children surviving her and the husband leased them but before the lessee made certain improvements thereon it discovered the true state of the title it cannot claim that the children by allowing the improvements to be made without any objection on their part were estopped to deny the validity of the lease where they in fact acted on the belief that their mother had left a will devising the land to their father, *Brandmeier v. Pond Creek Coal Co.*, (Penn. 1907), 67 Atl. 951. Rights in improvements, see further *infra*, §§259-262.

EVIDENCE

Maps and plats as evidence, see *post* §460.

Evidence as to boundaries, see further *ante* §26.

Evidence in ejectment, see *ante* §114.

Sec. 155. Proof and admissibility of deeds. Deeds and other instruments acknowledged before certain officers may be received in evidence, N. J. Laws 1906, Ch. 247. Deeds of public officials and persons occupying positions of trust are made prima facie evidence of facts relating to the execution of their powers by Tenn. Acts 1907, Ch. 334. Deeds defective in form and executed in behalf of defunct corporations may be proved by the record or copy thereof by Wis. Laws 1907, Ch. 330. Various Texas statutes as to the method of proving and recording deeds in open court construed, *Kimball v. Houston Oil Co.*, (Tex. 1907), 99 S. W. 852. Code 1896, § 1797, providing that the execution of a deed may be proved by the testimony of the maker does not authorize proof by testimony of declarations of the grantor, *Sledge v. Singley*, 139 Ala. 346, 37 So 98.

An ancient deed without attestation or acknowledgment is not admissible in evidence without proof of execution, *O'Neal v. Tenn. Coal, Iron & R. Co.*, 140 Ala. 378, 37 So. 275.

If a deed purports to have been executed by an officer of the Court under a decree, his power or authority must be shown to make it admissible in evidence, unless waived, *Winn v. Coggins*, (Fla. 1907), 42 S. 897.

A mortgage not filed for record in accordance with Alabama Code 1896, section 992, must be proved to have been executed before it is admissible in evidence. Under section 1797 this may be shown by the testimony of the maker without producing or accounting for the absence of the attesting witness, *Lewis v. Glass*, (Ala. 1905) 39 S. 771.

Sec. 156. Parol evidence affecting instruments.

Reformation of deeds by parol evidence, see *post* REFORMATION.

To identify property. Where a deed bound the grantee, a city, to macadamize "the street" parol evidence was admissible to show what the parties meant by this phrase, *City of Versailles v. Brown*, (Ky. 1906) 96 S. W. 1108.

To explain title given. An agreement between a dowress and an owner of a four-fifths interest providing for a boundary, each party "to have and to hold" one "end" of the land, was ambiguous as to whether the widow was to have a fee and parol evidence was therefore admissible thereon, *Slusher v. Slusher*, (Ky. 1907) 102 S. W. 1188. When a sheriff levied on and sold and the appellant purchased, all the interest that J. W. D. had in certain land, which was the fee in remainder subject to a life estate, the appellant should have been permitted to introduce parol evidence to prove the interest J. W. D. had in the land, and that the interest sought to be recovered was the same described in the execution, *Davis v. Dyer*, (Ky. 1906) 93 S. W. 629. A deed "exempting and reserving a strip of land to be used as a right of way" is so ambiguous as to require extrinsic evidence to show whether a fee or easement is reserved, *Pritchard v. Lewis*, 125 Wis. 604, 104 N. W. 989. Where the homestead rights of a mother are conveyed by her to a son with a parol agreement of possession during her life, and the son sells the property to another who threatens ejectment, the mother prayed that she be decreed a life estate. This would engraft the parol agreement upon the written deed changing the estate conveyed. The relief sought is not available without a reformation of the deed, and that is not available because of lack of expressed intention, *Waters v. Waters*, 124 Ga. 349, 52 S. E. 425.

Consideration. Parol evidence *held* admissible to show that part of the consideration for a deed of land was the privilege of having the grantor handle all the timber on the land at a certain price, *Mueller v. Cook*, 126 Wis. 504, 105 N. W. 1054. A written contract for the sale of two plantations for \$100,000, payable in cotton, not cash, in 10 equal instalments, cannot be varied by evidence that the parties intended that the cotton be grown on the premises sold, *Soudon Planting Co. v. Stevenson*, (Ark 1907) 102 S. W. 1114. Where a plaintiff alleges the promise of future support in addition to the \$200 expressed in the deed, and sues for the failure of defendant to perform his agreement, such consideration may be shown by parol, *Whitman v. Corley*, 72 S. C. 410, 52 S. E. 49.

Mistake. Where the title of a plaintiff in an action of ejectment is put in issue, parol evidence is admissible to explain scrivener's error resulting in ambiguity, *Leverett v. Bullard*, 121 Ga. 534, 49 S. E. 591. A devise of the N. $\frac{1}{2}$ of the

N. W. $\frac{1}{4}$, of section 29, where testator did not own that tract but did own the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ may be shown by parol evidence to mean the latter, *Whitehouse v. Whitehouse*, (Ia. 1907) 113 N. W. 759. Parol evidence is admissible to show that a deed was intended to express something different, and that a mistake was made in a deed, even when the estate of the wife of the witness was affected, provided the testimony concerned what took place between the witness and a third party, *Lehew v. Hewett*, 138 N. C. 6, 50 S. E. 459.

Cancellation of deeds for mistake, see *ante* §91.

Parol evidence inadmissible. When in an action for specific performance of a contract for the sale of land evidence was offered that the parties meant by the word "estate" the heirs of certain deceased persons it was inadmissible within the parol evidence rule, *Morrison v. Hazzard*, (Tex. 1906) 92 S. W. 33. It was held that where there was no plea of fraud or mistake in the execution of a deed parol evidence was inadmissible to show any other intention on the part of the grantor than that expressed in the deed, *McCreary v. Skidmon*, (Ky. 1907) 99 S. W. 219. A testator devised "lot of land 78 in the Second District of Dooly county" to A. The testator did not own lot 78 but lot 68 in that district, and "other lands adjoining" and had referred to lot 68 as belonging to A. In the absence of knowledge of the location of the "other lands" parol evidence as to the intention of the testator was inadmissible, *Oliver v. Henderson*, 121 Ga. 836, 49 S. E. 743.

Sec. 157. Proof of lost deeds, leases and records. The restoration of lost records is provided for by Nev. Laws 1907, Ch. LXVII.

Where a lease was executed in duplicate, one being given to the tenant and the other held by the landlord, parol evidence of its contents is inadmissible until both originals are shown to be not obtainable, *Peaks v. Cobb*, 192 Mass. 196, 77 N. E. 881.

Lost deeds. Abstracts of title are made prima facie evidence of title where deeds are lost by N. D. Laws 1907, Ch. 2. Hurd's Illinois Rev. St. 1905, c. 30, section 35, as to proof of a lost deed by a recorder's certified transcript construed in connection with c. 109, s. 2, as to the recording of plats and their proof by certified copies, *People v. Weimers*, 225

Ill. 17, 80 N. E. 45. In an action of ejectment, statements by a person in possession of land that he has lost his deed are not admissible on the ground that they are explanatory of his possession, *Campbell v. Bates*, 143 Ala. 338, 39 S. 144. When a deed has been destroyed, the bare entry of an order of court stating that the deed was admitted to record is insufficient to convey title, even when supported by a copy made by the son of the grantee, without evidence of the execution of the original deed, *Carter v. Wood*, 103 Va. 68, 48 S. E. 553. In an action to establish a lost deed where the registration was also destroyed Pub. Laws 1893, chap. 6, p. 37, gives the right to bring an action to prevent a cloud upon title, and the plaintiffs are entitled to a decree for setting up and recording the deed, *Jones v. Ballou*, 139 N. C. 526, 52 S. E. 254. The best evidence of a conveyance is the original deed, the next a certified copy of the record, but when the original deed has been lost and not put on record oral evidence of it may be offered. In connection with this the jury may consider who claims to be the owner, how long such claim has been set up and whether the land has been held adversely to such claim, *Carpenter v. Jones*, 76 Ark. 163, 88 S. W. 871.

Sec. 158. Certified copies—Patents.

When a duly certified copy of the judgment of probate does not accompany a copy of a will, it cannot be admitted as evidence, although a certificate of the register of probate accompanies it stating that said will had been proven and admitted to probate and record, *Youmans v. Ferguson*, 122 Ga. 331, 50 S. E. 141.

Conclusiveness. In Illinois where an affidavit in compliance with the statute for the purpose of introducing a certified copy of a deed is positive in its terms the maker of the affidavit may not be cross-examined regarding it, *Glos v. Garrett*, 219 Ill. 208, 76 N. E. 373.

Copy of incomplete instrument. Where a copy of a deed with only one witness is offered in evidence there is no presumption that it is a copy of the original, there being no law authorizing such a deed to be registered; such being the case, a copy of the same though registered, is no more than a copy at any other place, *Bower v. Cohen*, (Ga. 1906) 54 S. E. 918.

Loss of original. Unless the loss of a patent is shown or its absence otherwise accounted for an exemplified copy of the

records of the state land commissioner is inadmissible, *Carpenter v. Smith*, 76 Ark. 447, 88 S. W. 976. When a copy of an old book and a map showing sales of real estate are produced, and there is no evidence to prove that it is impossible to produce the original, the evidence is insufficient, *Roll v. Everett*, (N. J. Ch. 1907) 65 Atl. 732.

Statutes. Chapter 5162, p. 97, Florida Laws of 1903, "an act making copies of records evidence in re-establishment proceedings" is constitutional. The right to have one's controversies determined by existing rules of evidence is not a vested right, but the legislature may change the rules, *Campbell v. Skinner Mfg. Co.*, (Fla. 1907) 43 S. 874. *Hurd's Illinois Rev. St.* 1905, c. 51, section 18, as to proof of public records by copies, construed, *Glos. v. Holmes*, 228 Ill. 436, 81 N. E. 1064. *Missouri Revised Statutes* 1899, section 933, as to the admission of certified copies of deeds in evidence, construed, *Ming v. Olster*, 195 Mo. 460, 92 S. W. 898.

Patents. Alabama Code 1896, sections 1812 and following as to the admissibility of land patents, construed, *Butt v. Mastin*, 143 Ala. 321, 39 S. 217.

Cf. *Carpenter v. Smith*, 76 Ark. 447, 88 S. W. 976 *supra*.

Lost court records. To establish title under a sheriff's sale, a judgment rendered by a court of competent jurisdiction, a writ issued in conformity thereto, and a sale by the sheriff pursuant to the writ, must be shown, but when the original records are shown to have been lost or destroyed any or all of these facts may be shown by secondary evidence. After the expiration of 30 years, certified copies of the judgment and sheriff's deed, and the clerk's "charge docket" showing the issuance of *fiere facias*, are sufficient to prove such a title, there being nothing to suggest the want of jurisdiction or irregularity in the proceedings, *Fontelieu v. Fontelieu*, 116 La. 866, 41 S. 120.

Sec. 159. Evidence of title—Boundaries—Declarations. Where in ejectment the grantee in a certain guardian's deed was claimed to be a fictitious person, upon the guardian testifying that the grantee lived in a certain county and township persons well acquainted with the inhabitants thereof may testify that no person of that name ever lived there, *Phelps v. Nazworthy*, 226 Ill. 254, 80 N. E. 756.

Hearsay—Reports. A survey found in a county survey-

or's book is inadmissible in ejectment in the absence of evidence that it was the surveyor's official act, *Stumpe v. Kopp*, 201 Mo. 412, 99 S. W. 1073. When an assignee in bankruptcy conveyed land to one of the bankrupts and filed in the bankruptcy proceedings a report of the sale it was held that "the report had no greater dignity than if it had been a declaration made orally, or in a writing disconnected from the proceeding in court" and is inadmissible in a later suit to try title to the land. Declarations of the vendor, made after a conveyance of land, are not admissible to disparage the title he has conveyed to another, *Beall v. Chatham*, (Tex. 1907) 99 S. W. 1116.

Location of boundaries. In ejectment to determine a disputed boundary the defendant may prove the location of a division fence, *Ross v. Roy*, Ala. 1905), 39 S. 583. Evidence that boundary lines, as fixed by the early settlers, coincide with monuments in dispute is admissible to show that the monuments are the true corners, *Bridebaugh v. Bryant*, (Neb. 1907) 112 N. W. 571. In ejectment evidence of experts—surveyors—as to the true location of lands and boundaries, is admissible, *Chappell v. Roberts*, (Ala. 1907) 43 S. 489.

Admissions and declarations. Declarations by the grantor, subsequent to the execution of a deed are not evidence to impeach the deed, *Bain v. Bain*, (Ala. 1907) 43 S. 562. Statements to his children and to uninterested parties that he has only a life estate are of no effect as against a recorded deed of the fee and mortgages executed by one as fee owner, *McCarthy v. Cotton*, (Ia. 1906) 108 N. W. 217. The declaration of a deceased patentee made when he was on the land but was not living there and did not claim to own it that he had sold it to a certain person is not admissible in favor of a plaintiff in ejectment claiming under that person, *Anniston City Land Co. v. Edmondson*, 145 Ala. 557, 40 S. 505. Declarations by children to their mother to whom dower had not been assigned that "the place is yours" are not admissible because they do not relate to the declarant's possession, *Munsey v. Hanly*, 102 Me. 423, 67 Atl. 217. If in ejectment a deed is offered to show color of title it may be admissible subject to the right of the adverse party to have it finally excluded if no possession was taken thereunder. It is proper to ask a witness how long a certain person lived on the land "claiming to hold for another," *Henry v. Frohlichstein*, (Ala. 1907) 43 S. 126. In ejectment

a witness may be asked "Are you the purchaser of the property in dispute in this case?" and a statement by the alleged owner to a prospective purchaser while riding over the land "These are our woods, the line is further out there" is admissible both as *res gesta* and as a declaration as to boundaries made by one in possession. A map or plat of the land which has been shown to be correct, is admissible, *Driver v. King*, 145 Ala. 585, 40 S. 315. In a proceeding for the taking of land by eminent domain, the letter of the plaintiff offering to sell his land at a certain price is admissible in evidence when he says he will sell first to another purchaser if they are the first to accept his offer, showing that it is not an effort to compromise the suit, and the letter is against his own interest, *Kaufman v. Pittsburg C. & W. Ry. Co.*, 210 Pa. 440, 60 Atl. 2. Where in trespass as to a boundary line the plaintiff testified that she and her husband had an arrangement with the defendant and her husband, since deceased, as to the line but that it was never carried out and that in regard to whatever was done her husband acted with her consent, such evidence did not show that the plaintiff's husband had authority to act as her agent, so as to make competent conversations between him and the defendant's husband in the defendant's absence, *Dexter v. Thayer*, 189 Mass. 114, 75 N. E. 223.

Against heir of deceased person. Under Illinois Rev. St. 1874, c. 5, which provides that no party to an action shall be allowed to testify on his own motion or in his own behalf where the adverse party sues or defends as heirs of a deceased person, where the plaintiff claimed title as devisee of his father, and the defendant defended and prosecuted a cross bill as heir of his mother, neither were competent witnesses, *Heintz v. Dennis*, 216 Ill. 487, 75 N. E. 192. Where after the execution of a will devising the residuary estate to his brothers and sisters the testator executed a deed to one of the sisters providing therein that the consideration stated should be deducted from the grantee's share of the estate and reserving to the grantor a life estate, in a proceeding after his death to set aside the deed brought by the other devisees the latter were not rendered incompetent as witnesses by Hurd's Ill. Rev. St. 1903, c. 51, sec. 2, which provides that no party in an action may testify when any adverse party sues or defends as heir or devisee, *Seaton v. Lee*, 221 Ill. 282, 77 N. E. 446.

Sec. 160. Evidence of value. In condemnation proceedings an assessor's return of real estate for taxation is not admissible against the owner. The latter to show the damages to land not taken may offer evidence of the effect of the building of the road upon the rental thereof, *Lewis v. Englewood Elevated R. Co.*, 223 Ill. 223, 79 N. E. 44.

Remoteness in time. Evidence of the value of a stream fifteen years before may be admitted, although the witnesses have made their examination since the diversion of the water, *Stauffer v. E. Stroudsburg Borough*, 215 Pa. 143, 64 Atl. 411.

Opinions. Experts. Owner. Persons shown to be acquainted with the value or damages to property may, in connection with the facts, state their opinion as to such value or damages, *Southern Mo. Ry. Co. v. Woodard*, 193 Mo. 656, 92 S. W. 470. An expert can appraise lands after hearing the evidence in eminent domain proceedings without going to the locus in quo, *Louisiana Ry. & Nav. Co. v. Kohn*, 116 La. 159, 40 S. 602. Upon the question of the damages to land used for a brick kiln and taken for a railroad right of way witnesses engaged in the brick business and familiar with the value of land for that purpose, but not for other purposes, may give their opinion as to the damages, *St. Louis M. & S. E. R. Co. v. Continental Brick Co.*, 198 Mo. 698, 96 S. W. 1011. Evidence of the extent of the business done and testimony of witnesses who were qualified as experts upon the value of property for freight terminals was admissible, although they did not know the value of property generally in the city, *Sanitary Dist. of Chicago v. Pittsburg, Ft. W. & C. Ry. Co.*, 216 Ill. 575, 75 N. E. 248. In a proceeding for the taking of lands by eminent domain the evidence of a witness was admissible as evidence in regard to the value of the land when he testified that he knew the property and the sales of real estate in the neighborhood for ten to fifteen years, *Hope v. Philadelphia & W. R. Co.*, 211 Pa. 401, 60 Atl. 996. An expert upon water supply who knew nothing of the value of land nearby may be properly forbidden by the trial judge in an action for damages against a municipality for the taking of land for a water supply to testify (1) as to the value of the land for a water supply at the time of the taking: or (2) its value for all the uses to which in his judgment it was adapted: (3) the value of the water in the land, situated as it was at the time of the taking: (4) by what municipalities or communities could this water be used:

(5) the fair value of the land and water because of its special adaptation as a source of water supply to the communities for which it has a special adaptability; (6) the value of the locus, having regard to its special value and adaptability to filter and store water; and (7) assuming that there is in the town taking the land no other source of water supply sufficient for its needs, unless the water is treated, what would be the value of this land and the water in it as a source of water supply to the town—the value to the town—over and above the other source of supply by filtration and treatment, *Sargent v. Town of Merrimac*, 196 Mass. 171, 81 N. E. 970.

The owner of land in condemnation proceedings who is familiar with the property and its location and has been for years, and acquainted with the market value of the property in the neighborhood, may testify as to his opinion as to its value, *Metropolitan St. Ry. Co. v. Walsh*, 197 Mo. 392, 94 S. W. 860.

Values and sales of similar land. To make the value or selling price of similar land admissible as bearing upon the value of land in dispute it must be similar in location and character and the sales not too remote in time, *Hewitt v. Price*, 204 Mo. 31, 102 S. W. 647. Where the land sought to be condemned was a freight terminal of a great railway system it had no market value and the market value of land in the vicinity was not a criterion of its value, *Sanitary District of Chicago v. Pittsburg, Ft. W. & C. Ry. Co.*, 216 Ill. 575, 75 N. E. 248. In condemnation proceedings by a railroad sales of similar property to that involved, made in the neighborhood about the same time, are admissible to aid the jury in determining the damages. But sales made to the party itself seeking to condemn the property are not admissible. As Lewis on "Eminent Domain" says, "Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business." The details of the negotiations for the purchase of the very property sought to be condemned had between the railroad and the owner are also incompetent, *Metropolitan St. Ry. Co. v. Walsh*, 197 Mo. 392, 94 S. W. 860. In eminent domain proceedings for a railroad right of way a witness who has testified as to depreciation of the land not taken may be asked whether he knew of any farm

depreciated in value by a railroad going across it like the one in question, or any farm that sold or would sell for less on that account. The railroad may show voluntary sales of land in the vicinity situated substantially the same, but what it paid for a right of way one-half a mile distant cannot be shown, *Eldorado, &c., Ry. Co. v. Everett*, 225 Ill. 529, 80 N. E. 281. It was error to allow evidence as to what the petitioner and other railroads paid for land taken in the vicinity, *Chicago & A. R. Co. v. Scott*, 225 Ill. 352, 80 N. E. 404. Where evidence of voluntary sales of other land was inadmissible because not shown to be similarly situated it was error to allow the effect of such evidence to be brought before the jury upon cross examination upon the alleged ground of testing the knowledge of the witness, *Chicago R. Co. v. Kline*, 220 Ill. 334, 77 N. E. 229.

Mortgage value immaterial. It was held to be very doubtful whether in proceedings to recover damages to land caused by the building of an elevated railway the diminution in the mortgage value of premises is competent and at all events evidence that persons applied to by the owner were unwilling to loan as much as others had previously loaned thereon was incompetent, *Pierson v. Boston Elev. Ry. Co.*, 191 Mass. 223, 77 N. E. 769.

The actual rent paid for the first floor and basement in a twelve-story building is no evidence of the value of the fee. The general rental value of property is evidence from which the fee value may be computed, but the actual rent reserved is immaterial because that depends upon special circumstances, *Ettlinger v. Weil*, 184 N. Y. 179, 77 N. E. 31.

View. A jury should be instructed to consider knowledge gained from a view, *Chicago & A. R. Co. v. Scott*, 225 Ill. 352, 80 N. E. 404.

Neighborhood. The defendant, who claimed the value of the land had been increased by reason of its nearness to a fashionable club about which expensive houses had been built, could not in cross examination put in photographs of such houses, *Chicago R. Co. v. Kline*, 220 Ill. 334, 77 N. E. 229. A railroad company condemned a strip of land for a right of way, that was contiguous to land upon which there were two producing oil wells, which fact must be taken into consideration when assessing the compensation due the owner of the

land, *Norfolk & W. Ry. Co. v. Davis*, 58 W. Va. 620, 52 S. E. 724.

Effect on persons on premises. To show damage from noise caused by an elevated railway, evidence is admissible that persons who came into the petitioner's restaurant on the premises said on several occasions "Oh, we can't talk here; let us get out of here, and eat somewhere where we can talk and hear ourselves," and then they would get up and go out, *Pierson v. Boston Elev. Ry. Co.*, 191 Mass. 223, 77 N. E. 769.

Failure to put witness on stand. The evidence which would have been given by a witness who was summoned by one side of a case was unsatisfactory to the attorney, who paid his expenses back again in order to keep him out of the hands of the other attorney, but it was not necessary for a valid determination of the case for the witness to be turned over to the other side or to disclose to them what his evidence in a case regarding the settlement on public lands would have been, and such concealment did not invalidate the trial, *Kennedy v. Dickie*, 34 Mont. 205, 85 Pac. 982.

EXECUTION SALES

See *post*, JUDICIAL SALES.

Sec. 161. What may be levied upon. Sec. 688 of the Code of Civil Procedure prescribing what property may be taken on execution is amended by Cal. Stat. 1907, Ch. 360, sec. 3. A judgment directing a commissioner to sell land for a debt by implication authorizes the sale of only so much as is necessary to pay it, *Burk's Admr. v. Lane Lumber Co.*, (Ky. 1905) 89 S. W. 686. When A bought a piece of real estate advancing the entire purchase price and taking the record title but contracting to sell it to B when he repaid the principal and interest, a judgment against A could not be enforced against B's equity in the land, *Holmes v. Wolfard*, 47 Or. 93, 81 Pac. 819.

Vendee's interest. Under Civ. Code 1895, p. 5432-5434, the holder of a bond for title subject to a security deed, possesses no interest subject to levy by a creditor, *Shumate v. McLendon*, 120 Ga. 396, 48 S. E. 10. Where under a bond

for a deed a note was given for the purchase money of land, an execution on a judgment could issue against any property of the defendant other than the land for the purchase price of which the note was given; the fact that the note was given for the purchase money does not entitle the plaintiff to sell the equitable interest of the vendee therein, *McPeters v. English*, 141 N. C. 491, 54 S. E. 417.

Mortgaged property. A judgment creditor cannot levy execution on property held by the mortgagee under a voidable title, when the judgment is junior to the mortgage. The creditor acquires no right to undo what has been done, and what the mortgagor may have good reason to object to having undone, *Williams v. J. P. Williams Co.*, 122 Ga. 178, 50 S. E. 52.

Where debtor owns only an undivided interest. Although an officer levied an attachment on land and sold the whole of it at an execution sale when the debtor owned only a two-thirds interest, the sale was valid and conveyed all the debtor's interest in the property under Rev. St., (Maine) c. 78, sec. 32, *Hamant v. Creamer*, 101 Me. 222, 63 Atl. 736.

Sec. 162. What passes at sale—Priorities. When land is bought after the issuance of execution against it, the purchaser takes title subject to the execution, although the owner resided in another county outside the immediate jurisdiction of the court, *C. C. Ansley Co. v. O'Byrne*, 120 Ga. 618, 48 S. E. 228.

Right of redemption from foreclosure. A purchase by a judgment creditor at an execution sale of the debtor's statutory right to redeem from a foreclosure, did not prior to its report and confirmation by the court, satisfy the judgment and destroy the judgment creditor's right to redeem from the foreclosure under Alabama Code 1896, section 3510, *McGaugh v. Deposit Bank*, 141 Ala. 434, 38 S. 181. The right to redeem from an execution sale given by Alabama Code 1896, section 3510, to certain "judgment creditors of the debtor" does not pass to the assignee of such a judgment, *Chambers v. Pollak*, 143 Ala. 438, 39 S. 316.

Priorities. Civ. Code 1217 was construed as giving a prior grantee holding under an unrecorded deed a valid title against the purchaser with notice at a sheriff's sale to foreclose liens on mining property, *Robinson v. Muir*, (Cal. 1907) 90

Pac. 521. When land is sold under execution, the sale relates back to the time of the levy, and the title passes as of the date of the levy, and a deed thereafter made, by reason of the sale, prevails over one made after levy but before sale, *Layne v. Layne*, (Ky. 1906) 90 S. W. 555. Buyers of land upon execution sale under a judgment for a claim not a lien thereon are not bona fide purchasers as against a grantee from the debtor before judgment, such grantee having always been in possession claiming ownership, *Chandler v. Dixon*, 31 Ky. Law Rep. 174, 101 S. W. 939.

Sec. 163. Validity of sale. The manner of giving notice of the sale of land on execution is prescribed by Cal. Stat. 1907, Ch. 525, amending Sec. 692 of the Code of Civil Procedure. A sale of real estate under an execution issued on a dormant judgment is void as to a grantee of the judgment debtor who took title from him while the judgment was alive and a lien on the property, *Harvey v. Godding*, (Neb. 1906) 109 N. W. 220. When after a sale of land upon execution two separate orders were made without notice to the defendants to correct errors in the original commissioner's sale it was held that the defendant's substantial rights were not affected, *Forrester v. Howard*, (Ky. 1907) 98 S. W. 984. The plaintiff in a suit for the appointment of a receiver bid in the property at the execution sale and then brought a suit to have the sale cancelled by a collateral action. When the sale was duly confirmed by the court the purchase was valid and no little irregularity in the appointment of the receiver, or in the manner in which the sale was conducted, will affect his title, *Threadgill v. Colcord*, 16 Okl. 447, 85 Pac. 703.

A levying officer violates his duty by refusing to levy upon the property pointed out by the defendant when the property is sufficient to satisfy the execution and he is liable to him for such actual damages as may be sustained as a result of the officer's conduct; but this does not invalidate the levy on other property, *Hollinshed v. Woodward*, 124 Ga. 721, 52 S. E. 815. An execution sale which describes certain sections and fractional sections as "lying on or near the seashore in the vicinity of Miss." but omits the county or state, is void. The Mississippi and Federal statutes as to the place where such a sale when upon an execution issued by a Federal Court should be held, construed, *Jones v. Rogers*, 85 Miss. 802, 38 S. 742. An

execution debtor who afterwards leased his own land from the purchaser at the execution sale is estopped as against a subsequent purchaser to claim a right to redeem because of a mistake in the sale about which he knew or could have known, *Warehouse Co. v. Purdy*, (Ky. 1907) 102 S. W. 303.

Amount. Where a judgment creditor for \$42.40 reduced by a payment on account of \$25 had a sale of the debtor's property for the full amount of the judgment without including the credit the sale was void because for an amount materially greater than that due, *Downs v. Dennis*, (Ark. 1907) 102 S. W. 699.

Inadequacy of price. Where a tract of land valued at \$1,800 sold for \$5.00 at execution sale, a court may set aside the sale for inadequacy of compensation, especially when the sheriff refused to accept the amount of the judgment and costs from the owner, *McCoy v. Brooks*, (Ariz. 1905), 80 Pac. 365. When land has been sold at an execution sale in a period of financial depression and it is afterwards resold by the purchaser for a slight advance in price after paying all mortgages, etc., there was not shown to be such inadequacy of price as would authorize the court to set aside the sale, especially when the owner was unable to sell the land himself, *Nodine v. Richmond*, 48 Or. 527, 87 Pac. 775.

Collusive bidding. Information given by the purchaser of the property to another bidder at the sale that "this land is being sold subject to mortgages," although deterring the other bidder, was not a prevention of competitive bidding as it was true, *Nodine v. Richmond*, 48 Or. 527, 87 Pac. 775. When a bidder at a sale induced another purchaser not to bid on the property by promising to convey to him 20 acres of the land at the price he paid for it, the contract would not be enforceable on grounds of public policy, and a decision on the evidence that the contract was not made as claimed would not be overruled, *Downing v. Ernst*, (Colo. 1907) 92 Pac. 230. An agent conducting an execution sale learned that a purchaser procured by the owner was prepared to offer \$3,300 for the property, so the agent promised to let him have the property for \$3,200 if he would not bid at the sale, and the agent thereupon sold the property for \$2,000 to himself and then resold it for \$3,200 to the purchaser; but he had no right to keep the profit from his principal, although the principal received the entire amount of the indebtedness, *Albright v. Phoenix Ins.*

Co. of H. Conn., 72 Kan. 591, 84 Pac. 383. Where the plaintiff alleges that a contract to buy a lot of land made valuable by logging operations was for \$700.00 and that the defendant has refused to pay the balance beyond the sum for which the property was sold at a sale under a decree of the court as he agreed, the plaintiff must prove fraud and conspiracy to get the land at a low price by very conclusive evidence, otherwise the sale will not be held void, and upset bids when not more than the total price brought, will not be considered, *Sansom v. Wolford*, 60 W. Va. 380, 55 S. E. 1020.

Sec. 164. Enjoining. The Supreme Court of the state of New York does not have jurisdiction to enjoin a United States Marshal from proceeding to a sale of land on execution where the attachment issued from the Federal Circuit Court and the writ was filed in the office of the clerk of the Court in the district in which the property lay prior to an action in the state Court for the appointment of a receiver of the defendant corporation, *Beardslee v. Ingraham*, 183 N. Y. 411, 76 N. E. 476.

Sec. 165. Redemption from. Various sections of the Alabama Code of 1896 as to redemption from execution sales, construed, *Francis v. White*, 142 Ala. 590, 39 S. 174. Sec. 251, B & C's Codes, providing method for redeeming land from execution sale is amended by Ore. Laws 1907, Ch. 224.

The amendment of Feb. 26, 1897, (St. 1897, p. 41, c. 44) to Code Civ. Proc., § 702, which extended the time for the redemption of real estate from an execution sale to one year, was construed to apply only to judgments made after the passage of the amendment. For a full discussion, see *Welsh v. Cross*, 146 Cal. 621, 81 Pac. 229.

EXECUTORS AND ADMINISTRATORS

Sale of decedent's real estate, see further *post*, Judicial sales.

Sec. 166. Contracts and other acts affecting real estate. Code 1896 §§154-158, relative to control of executor over lands of his testator, construed, *Griffith v. Rudisill*, 141 Ala. 200, 37 S. 83. Where partners executed a mortgage the

surviving partner, and his wife and the wife of the deceased partner could not create a lien on the partnership estate after another person had been appointed administrator and was in charge of the partnership estate, so as to exclude the right of the partnership administrator to the excess of the purchase money in the hands of the trustees after satisfying the debt, *Barnes v. Stone*, 198 Mo. 471, 95 S. W. 915. An administrator who agreed to sell land the deed "to be given as soon as possible after estate is advertised and the deed can be given" who later was instrumental in getting heirs to object to the sale and as a result the probate court refused to give him leave to convey, having acted throughout in good faith, was not liable for breach of contract, *Wilson v. Root*, (Conn. 1907) 67 Atl. 482.

Option. Where the executors had authority by the terms of the will to sell the land owned by the deceased, and in pursuance of this authority, they gave an option on land for 90 days, agreeing to give a good and sufficient deed on payment of half the purchase price, and the optionees did not actually tender the purchase price, and the option was extended orally by only one of the trustees, and the deed tendered was to be signed by the devisees and not by the executors, the heirs are not bound to give a deed, and the executors will not be ordered to give a deed, when a contract has been made by the heirs to sell to a purchaser without notice, *Trogden v. Williams*, 144 N. C. 192, 56 S. E. 865.

Oral agreement. Although an administrator had made an arrangement with the heirs by which he should have an equitable lien on the real estate for the amount of the advances he made the estate and his commissions as administrator, such a verbal agreement although approved by the probate court when it discharged the administrators did not operate to place a lien on the property in view of the statute of frauds. The doctrine of part performance was not complied with when the administrator took possession of the property under the oral agreement and proceeded to collect the rents and apply them to the payment of the amount due him, *Tucker v. S. Ottenheimer Estate*, 46 Or. 585, 81 Pac. 360.

Sec. 167. Rights of action. When land has been sold and conveyed, the personal representative may collect the purchase money by an action, without joining with him the heirs-

at-law, *Brackett's Admr. v. Boreing*, (Ky. 1905) 89 S. W. 496. Where an administrator brings suit for the possession of real estate against an heir in order to distribute the property, an order granted by the ordinary without notice to the heir is not conclusive evidence of the necessity of distribution. Civ. Code 1895, s. 3358, *Park v. Mullins*, 124 Ga. 1072, 53 S. E. 568. Where A agreed to pay all the expenses of administration of an estate in consideration of certain conveyances of land by the heirs and of a contract with B who was a creditor of the estate as well as A, the administrator had a right to bring suit to enforce the verbal contract made after the death of the intestate, *Stewart v. Rogers*, 71 Kan. 53, 80 Pac. 58. Code Civ. Proc. §1597-1602, relating to the conveyance of land after the death of the owner, who had contracted to sell it, was construed as giving the administrator a right to sue the estate for such a conveyance under the contract and it was not necessary for him to resign first, *Garner's Estate*, In re, 147 Cal. 457, 82 Pac. 68. As the right of an administrator to bring an action for the possession of land fraudulently conveyed by the decedent is based in Massachusetts solely on Rev. Laws, c. 146, sec. 17, authorizing him to act only when licensed, an action brought pending an appeal from a probate decree granting such license is premature. Under section 2 of the same chapter a writ of entry by an administrator brought more than five years after the grantor's decease cannot be maintained, although a prior action was brought within five years and dismissed because premature, *Tyndale v. Stanwood*, 190 Mass. 513, 77 N. E. 481.

Before a foreign administrator can institute suit in this state, it must be shown (Civ. Code 1895, || 3521) that the intestate was domiciled in the state where the letters of administration were granted and that no administrator has been appointed in this state, Taylor v. McKee, 121 Ga. 223, 48 S. E. 943.

Sec. 168. Liabilities—Actions against—Land affected by. An executor, failing to insure a barn, cannot avoid liability for a loss by fire on the ground that his wife the testatrix had never had it insured, *Ramsey's Estate*, In re (N. J. Prerog. 1907) 66 Atl. 410. Since under Mass. Rev. Laws, c. 142, secs. 30-32, providing for the settlement of insolvent estates of deceased persons it is impossible for a creditor by bringing an

action and making an attachment to obtain a preference over other creditors, a creditor of an estate may attach real estate of a decedent upon a writ against the administrator, *Herthel v. McKim*, 190 Mass. 522, 77 N. E. 695. Under Mass. Rev. Laws, c. 178, secs. 53 et seq, a person obtaining a judgment against an administrator or executor may enforce it against the real estate of the decedent in the hands of purchasers from devisees or heirs. A release of an attachment on mesne process in a suit against the decedent in his lifetime does not affect the right to levy upon the judgment when recovered, *Tracy v. Strassel*, 191 Mass. 187, 77 N. E. 700.

Under the Code of 1899, c. 127, sec. 4, it was held that a suit by a second committee after the death of the first committee of the estate of a deceased person could be maintained in the name of the second committee against the estate of the first committee and could be reviewed after the death of the insane person in the name of the second committee, *Straight v. Ice*, 56 W. V. 60, 48 S. E. 837.

Laches and limitations. A beneficiary under a will who eleven years after coming of age sued her brother as administrator de bonis non, 12 years after his final settlement of the estate, the beneficiary's husband having been appointed to succeed him, was barred by laches, *Clift v. Newell*, (Ky. 1907) 102 S. W. 832. Code 1887, sec. 2920, (Va. Code, 1904, p. 699) which limits the recovery on actions against an estate to five years after its accrual was construed not to bar the liability of heirs of a surety of real estate who had judgment entered against him in 1871, which was confirmed by a decree in 1887, as the right of recovery lasted for 20 years, *Sipe v. Baggett v. Edwards*, 126 Ga. 463 55 S. E. 250.

A *security deed* was granted to A with power of sale in case of non-payment of the debt and it granted power of attorney to A to make out a deed to the purchaser at such a sale. B the grantor died but the power of sale or attorney was not revoked by his death and the administrator was not entitled to twelve months' delay as it was not a suit against the estate, *Baggett v. Edwards*, 126 Ga. 463 55 S. E. 250.

Sec. 169. Proceedings to mortgage real estate. The proceedings requisite to enable an executor or administrator to mortgage real estate are described by Cal. Stat. 1907, Ch. 532, amending Sec. 1578 of the Code of Civil Procedure.

Sec. 170. Settlement of estate. Under the New York Statutes an executrix cannot be reimbursed out of the proceeds of a sale of the testator's land for the expenses of administration, consisting mainly of her attorney's fees in a contest over the will, to the exclusion of creditors of the estate, *Natch, In re*, 182 N. Y. 320, 75 N. E. 153. An executor occupied a house and then settled his wife's claim by deeding the house to her which was not objected to. Although the deed was not recorded until after his death, his responsibility for the rent ceased when he delivered the deed, *Lane's Estate, In re*, 79 Vt. 323, 65 Atl. 102. Where the testator in one clause gave his widow an income of \$5,000 per year, in another devised his home to his executors to collect and pay the rent to the widow or to permit her to occupy it rent free and in case of a sale thereof with her consent to pay her the income from the proceeds, and in another gave the residue of his estate to his executors in trust to collect the income and pay the taxes, including repairs on the real estate, it was held that the trustees could pay all charges and expenses for maintaining the home, *In re King*, 183 N. Y. 440, 76 N. E. 584.

Sec. 171. Sale of real estate—In general. Under Code Sec. 3324 a creditor who receives no notice of a sale may attack it collaterally in a suit to subject the heir's interest to his claim, *Mullin v. White*, (Ia. 1907) 112 N. W. 164. Rev. St. 1898, Sec. 3823 gives to an administrator the right to take possession of the real estate when the rents and profits are necessary in the settlement of the estate; but until this right is exercised there can be no intervening estate in him, *Hinman v. Hinman*, 126 Wis. 191, 105 N. W. 788.

Under power in will. Where a will contained the following provision "I will and direct my executors after two years from my death they may sell if deemed by them compatible with the interest of my children the residue of all the lands and real estate I own or may hereafter acquire on such terms as they may think best for my children. One-half of the proceeds of the sales is to be equally divided among my said children, and paid to each of them in cash.....The other half.....I direct my executors to invest.....:" the executors were given a discretion to make the sale but were not required so to do, *Whitfield v. Thompson*, 85 Miss. 749, 36 S. 113. When a will granted a life estate to the widow

with remainder to the children, a deed by the widow who was executrix of the will only granted her own life estate and not a fee-simple title when no power of sale was contained in the will, *Glore v. Scroggins*, 124 Ga. 922, 53 S. E. 690. Where a will after certain specific bequests, gave the remainder to a hospital in trust to pay certain annuities, and directed the remainder of the income to be added to the principal during the lives of the annuitants, and on the death of all directed the hospital "to take to its own use one-quarter of all the estate, and to convey the residue", and by the terms of a compromise as shown by the decree of the probate court, the hospital received a certain sum of money in lieu of all claims under the will and the residue was "to be paid" to certain persons, it was held that the administrator with the will annexed had no power, under either will or agreement, to sell real estate to pay the persons named nor to make partition among them, but could only convey to them as tenants in common, *Cronan v. Adams*, 189 Mass. 190, 75 N. E. 101.

Administrators with the will annexed. Shannon's Tennessee Code, s. 3976, providing that administrators with the will annexed may sell land if the executors possessed that power, construed, *Hardin v. Hassell*, (Tenn. 1907) 100 S. W. 720. A nonresident who owned real estate in Kansas died in another state, the executors qualified and received letters testamentary in Kansas, but when one administrator removed, and the other died, his administrator de bonis non was not qualified to sell the real estate in Kansas, without giving notice and obtaining an order of the court, although such notice had been given by the two executors his predecessors, *Albright v. Bangs*, 72 Kan. 435, 83 Pac. 1030.

Foreign executor. Where a testator residing in Massachusetts at his death gave his executors power to sell land and they conveyed Vermont land before the will was probated in Vermont the later probate thereof related back and made the deed valid although no letters of administration were issued in Vermont, *Tudor v. Tudor*, (Vt. 1907) 67 Atl. 539.

By order of court. In Alabama the probate Court has no jurisdiction to sell the decedent's land to pay the costs of administration or a debt contracted by the administrator, *Bolen v. Hoven*, 143 Ala. 652, 39 S. 379. An executor cannot be temporarily ousted from his office and commissioners appointed to sell land on which there was a lien in the life of the

deceased, but proceedings must go according to Revisal 1905 s. 43, 100, 103-131, *Atkinson v. Ricks*, 140 N. C. 418, 53 S. E. 230.

Delay in sale. After creditors have agreed that the executor of an insolvent estate might manage the real estate and endeavor to secure payment for them a delay of 12 years in applying for a sale of the land for the payment of debts will not be held unreasonable, *Mayo v. Mayo*, 79 Ark. 570, 96 S. W. 165. An executrix with power by an order of court to sell land under which she might have realized enough to pay all the debts, secured and unsecured, who purposely delayed the sale until the land was sold under foreclosure at which she became the buyer for a sum only sufficient to pay the mortgage debt and costs, will be divested of the title so acquired and it will be revested in the estate subject to her right of subrogation to the rights of the beneficiary under the mortgage deed of trust, *Stitt v. Stitt*, 205 Mo. 155, 103 S. W. 547. Where a widow acquiesced in her husband's will, granting her a life estate in his property with the remainder to her children, and her heirs acquiesced in it for 8 years after her death, there was an election to abide by the will, and an administrator cannot then have the property sold to pay her debts, *Hoggard v. Jordan*, 140 N. C. 610, 53 S. E. 220.

After deed by executor. The executors of a will assented to the devise for life to the widow of the testator, and at her death assented to the devises to the children, giving to each child a deed for his or her part. Such land was no longer any part of the estate of the testator, the executors having no power of recovery, and the ordinary having no power to grant an order of sale, *Watkins v. Gilmore*, 121 Ga. 488, 49 S. E. 598.

Commission of executor. The executor sold a piece of real estate subject to a mortgage, which had been presented as a claim against the estate and allowed, and he was entitled to a full commission on the entire amount of the sale and his commission was not limited to the net proceeds above the amount of the mortgage, *Pease's Estate in re*, 149 Cal. 167, 85 Pac. 149.

Lien by contract on proceeds. When the deceased had made a contract with a real estate company to sell land and develop it, under which they went to great expense preparing the property for sale, the contract became void on the death of the testator, as it contained a clause requiring the

testator's approval of the prices for which the land sold. The real estate company was entitled, however, to reimbursement for the expense it had undergone from the proceeds of the subsequent sale of the property, *Fisher v. Southern L. & T. Co.*, 138 N. C. 90, 50 S. E. 592.

Statutes. Alabama Code 1896, section 158 as to the right of an executor or administrator to sell the decedent's land to pay debts, construed, *Little v. Marx*, 145 Ala. 620, 39 S. 517. Kirby's Arkansas Digest section 79 providing that lands shall be assets in the hands of an executor or administrator, construed, *Reeder v. Meredith*, 78 Ark. 109, 93 S. W. 558. The formalities to be observed at sales of real estate by executors and administrators are prescribed by Col. Laws 1907, Ch. 245, Sec. 2, amending Laws 1903, Ch. 181, Sec. 106. Sales of mortgaged real estate of deceased persons, except subject to the mortgage, shall not be ordered by the probate court after ten years from the death of the owner: Conn. Acts 1907, Ch. 28. As to person who shall sell real estate subject to a life estate on the termination of which the testator directs it to be sold, see Del. Laws of 1907, Ch. 235, amending Rev. Stat., Ch. 90, Sec. 17, as amended by Del. Laws, Ch. 79, Vol. 14. Conveyances of real estate by executors, administrators and guardians not to be void for lack of proper proceedings, Ia. Laws 1907, Ch. 248. Kentucky Civ. Code Prac., section 428-430, as to sale of a decedent's land when the personalty is insufficient to pay debts, construed, *Tabb v. Wortham's Admr.*, (Ky. 1905) 89 S. W. 191. Kentucky Civ. Code Prac., sections 60, 62 and 490, as to the venue of proceedings by an administrator for leave to sell the decedent's land, construed, *Goldsmith's Admr. v. Hieatt*, (Ky. 1906) 90 S. W. 259. Sec. 13, Ch. 73 Rev. Stat. giving to courts power to authorize sales of estate of non-resident owners and prescribing procedure, amended by Me. Laws 1907, Ch. 37. Rev. Laws, Ch. 146, Sec. 18, providing for sales of real estate by executors and administrators for purposes of distribution is amended by Mass. Acts 1906, Ch. 73. Rev. Laws, Ch. 146, Sec. 18, authorizing probate courts to license the sale of real estate of deceased persons for distribution is amended by Mass. Acts 1907, Ch. 236. The time within which real estate of deceased persons may be taken or sold for the payment of their debts is specified by Mass. Acts 1907, Ch. 549. Missouri Rev. St. 1899, sections 148, 167 and 288 as to the sale of real estate of a decedent, administrator's

reports thereon and an appeal from the order of the Probate Court for such a sale, construed. *Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283. Sec. 4982, *Cobbey's Ann. St.* 1903, held to apply to irregular, not to void, sales, *Brandon v. Jensen*, (Neb. 1905) 104 N. W. 1054. Conveyance, by executor, of land held in trust may be ordered by court, N. J. Laws 1906, Ch. 24. The statutes (Laws of 1901, p. 335, c. 186) require the cestuis que trust to make a written request to the personal representative of a deceased trustee for the sale of real estate. Where there was no such written request, the executor of the deceased trustee has no right to make such a sale. *Eason v. Dortch*, 136 N. C. 291, 48 S. E. 741. Executors selling land in county other than that in which administration is had are required to record evidence of their authority by Ore. Laws 1907, Ch. 75. Sec. 2483 *Vt. Stat.* authorizing sales of real estate is amended by *Vt. Laws* 1906, No. 84. Sales of real estate pursuant to contracts of decedents are regulated by *Wis. Laws* 1907, Ch. 660.

Sec. 172. Sale of real estate—Validity—Setting aside.

When a sale was made at a regular administrator's sale and the administrator acquiesced in the sale of the property, he might be enjoined from making a sale at a higher price to another purchaser, although no memorandum in writing was made, *Green v. Freeman*, 126 Ga. 274, 55 S. E. 45. When an order of the probate court grants leave to sell certain specified land, it must affirmatively appear that the land described in the order is the same land conveyed by the deed; otherwise a grantee under such a deed cannot recover the land bought from the administratrix. *Hall v. Davis*, 122 Ga. 252, 50 S. E. 106.

Private sale. An interest in real estate left by a decedent was sold at private sale by the administrators. An heir at law with knowledge of the intention to make a sale, who made a quitclaim deed in order to effect that purpose may not invoke equitable relief to set aside the sale on the ground that the sale was a private and not a public administrators' sale, *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679.

Laches. Where, at the time of a sale of land by executors, the heirs knew that one of the executors had furnished nearly half the purchase money but made no move for four years to set aside the sale, permitting the purchaser in the

meantime to remain in possession, their bill to set it aside was properly dismissed, *Brinkerhoff v. Brinkerhoff*, 226 Ill. 550, 80 N. E. 1056. Where land which had been devised for life was sold to pay debts by order of the probate court the heirs by a delay of 28 years were barred by laches from the right to have the sale set aside, *Lindsey v. Fabens*, 189 Mass. 329, 75 N. E. 623.

Sec. 173. Sale of real estate—Who entitled to ask for—Rights of purchaser. When a will required an executor to sell certain land and divide the proceeds among the testator's children creditors of the children who hold orders on the executor payable out of the children's share in the estate are entitled to have the land sold, *Mitchell v. Carrollton Bank*, (Ky. 1906) 97 S. W. 45. A purchaser at an administrator's sale is entitled to a deed from the administrator, when the holder of a loan deed has given his consent to the sale of the fee simple, and if the auctioneer announced it when he sold, the purchaser may bring an action to compel the holder of the loan deed to cancel his indebtedness. *Mallard v. Curran*, 123 Ga. 872, 51 S. E. 712.

Sec. 174. Purchase of real estate by executor—Effect of. Although the administrator acquires the title to real estate as payment for debts due the estate, the heirs have no title to it while it is in his hands but it must be regarded as personalty. *Weir v. Bagby*, 72 Kan. 67, 82 Pac. 585. If an executor buys a mortgage note, forecloses the mortgage and buys the property himself, subsequently selling it at a higher price than he paid, he may be charged with the amount of the taxes, expenses, and interest, and allowed credit for the increased price when he resold it, and the rent collected. *Roach's Estate in re*, (Or. 1907), 92 Pac. 118. See *post* §175.

Sec. 175. Personal dealings by executor. When a commissioner appointed to sell land owned by an estate, directly or indirectly, becomes the purchaser at his own sale, the sale is void. The heirs, however, must refund to the commissioner's grantees his purchase money with interest. *Penn v. Rhoades*, (Ky. 1907) 100 S. W. 288. An administrator of an estate may purchase a mortgage against the estate and be subrogated to the rights of the mortgagor when he purchases

with his own funds, and he is not required to register the assignment in order to have the mortgage binding on the heirs, but he can not avail himself of any securities he holds to the prejudice of other creditors or heirs, *Morton v. Blades Lumber Co.*, 144 N. C. 31, 56 S. E. 551. An administrator had his agent purchase at a foreclosure sale property belonging partly to himself and partly to the estate, but he could not claim to hold adversely to the estate or refuse the estate the privilege of redemption. *Smith v. Goethe*, 147 Cal. 725, 82 Pac. 384. Where two executors had conveyed the title of the testator and one had bid in the property at a foreclosure sale and taken the title in his name alone and evidence was offered that this sale was merely a mode of securing payment to the estate by the mortgagor, and such payment was made, and the executor thereupon executed a conveyance in accordance with the agreement, a devisee could not claim both the money and the land. *Board of Education of Glynn County v. Day*, 128 Ga. 156, 57 S. E. 359.

Sec. 176. Deed signed by only one of several executors. A co-executor executed a deed without the signature of his joint executors, and if the heirs did not receive notice and a later deed was recorded first by an administrator, the heirs were not held to have acquiesced in his unauthorized act. *Hosch Lumber Co. v. Weeks*, 123 Ga. 336, 51 S. E. 439. Where a testator devises the residue to executors "in trustto rent, sell or dispose of the rest. . . .of my said real estate", he creates an imperative power to dispose of the residue, and where both executors held a public sale thereunder but only one joined in the deed, the purchaser upon paying the purchase price took the equitable title thereto. Such a purchaser under N. Y. Civ. Code, c. 14, tit. 1, art. 5, being in possession, may maintain an action to quiet the title thereto, *Brown v. Doherty*, 185 N. Y. 383, 78 N. E. 147.

FENCES

As boundaries, see *ante* § 26.

Covenant for erection of fence running with the land, see *ante* § 46.

Sec. 177. In general—Height—Repairs—Right to remove—Cost. An owner of land may build a high fence on his land depriving the adjoining owner of light and air, and the adjoining owner cannot maintain an injunction against him. *Koblegard v. Hale*, 60 W. Va. 37, 53 S. E. 793. In Louisiana the owner of an unclaimed lot cannot be forced to contribute to the cost of a line fence put in by some one else, *Bouchereau v. Guilne*, 116 La. 534, 40 S. 863.

Although A. granted a piece of land to B. with a proviso in the deed "To have and to hold * * * so long as B. keeps the line fence in repair," B. was not responsible for damages adjudged against A. for a horse being injured on the fence if there was no evidence that it was due to B.'s negligence and not to A.'s negligence, *Hubbard v. Gould*, (N. H. 1906) 64 Atl. 668.

A town passed an ordinance ordering the removal of all fences along an alley, but where a fence existed on the plaintiff's property outside of the public easement, the ordinance was invalid as a taking without compensation, *Riley v. Town of Greenwood*, 72 S. C. 90, 51 S. E. 532.

Sec. 178. Statutes regulating. Sec. 1378 of Kirby's Digest, providing for the establishing of fencing districts, is amended by Ark. Acts of 1907, No. 291. Construction of fences and apportionment of cost of building and repair is regulated by Id. laws 1907, Ho. Bill No. 90, amending Sec. 1301 (as amended by Act of Mch. 14, 1901) and 1303 Rev. Stat. 1887. Sec. 2416, Comp. Laws, providing for the maintenance of fences by adjoining owners, is amended by Mich. Acts 1907, No. 39. Woven wire fences are defined by Ore. Laws 1907, Ch. 166. Barbed wire fences are forbidden except by consent of adjoining owners by R. I. Laws 1906, Ch. 1364. Sec. 3567 Vt. Stat. defining fences is amended by Vt. Laws 1906, No. 112. Sec. 3523 and 3526 B.'s Codes, providing for division of expense of erection and care of fences are amended by Wash. Laws 1907, Ch. 13. The details of construction

of fences are contained in Wis. Laws 1907, Ch. 91. St. 1898, Sec. 1391, requiring adjoining owners to fence construed, *Peterson vs. Johnson*, (Wis. 1907) 111 N. W. 659. Common councils of cities are given power to regulate fences between lands by N. J. Laws 1907, Ch. 176.

Sec. 179. Statutes requiring railroads to fence. Railroads within a certain district are required to fence their rights of way to prevent the spread of diseases by Ark. Acts of 1907, No. 409. Railroads are required to erect fences on their lines and on failure to do so are made liable for damages and the expense of fencing by Id. Laws 1907, Sen. Bill No. 23, Act of Mch. 7, 1901, repealed. As to what is not a farm crossing within *Hurd's Illinois Rev. St. 1905*, p. 1557, c. 114, section 62, the railroad fencing Act, see, *Williams v. Chicago & N. W. Ry Co.*, 228 Ill. 593, 81 N. E. 1133. *Burns Indiana Ann. St. Supp. 1905*, section 5479d as to the liability of an interurban electric railroad for damages when it had failed to fence its right of way, construed, *Campbell v. Indianapolis & N. W. Traction Co.*, 39 Ind. App. 66, 79 N. E. 223. Construction of fences along railroad rights of way required and materials designated, Ia. Laws 1907, Ch. 100. Evidence held sufficient to show that certain railroad premises were "yards" within the meaning of the statute and the company not liable for the death of animals entering where its fence was down, *Bird v. Mich. Cent. R. Co.*, 145 Mich. 706, 108 N. W. 1100. Under Sec. 6294 Comp. Laws 1897, a railroad must maintain cattle guards and wing fences at the point where the unfenced station grounds join the fenced portion of the way, *Stewart v. Grand Rapids & I. Ry. Co.*, 147 Mich. 48, 110 N. W. 126. Sec. 2692 Gen. Stat. Minn. 1894 requiring railroads to fence on each side of the road applies to side tracks and repair shops, *Mattes v. Gt. North. Ry. Co.*, 95 Minn. 386, 1905, 104 N. W. 234. Gen. St. 1894 Sec. 2055 requiring railroads to fence their rights of way construed, *Ellington v. Gt. Nor. Ry. Co.*, 96 Minn. 176, 104 N. W. 827. Sec. 1997 Rev. Laws 1905 relative to erection of woven wire fences by railroads is amended by Minn. Laws 1907, Ch. 333. Railroad companies are required to maintain fences and cattle guards by Mont. Laws 1907, Ch. 59, Amending Laws 1905, Ch. 29, Sec. 1. The statute requiring railroads to fence their rights of way must be so construed as to provide for the safety of employees and the

proper operation of the road and the convenience of the public, *Chicago, B. & Q. R. Co. v. Sevcek*, (Neb. 1907) 110 N. W. 639. Sec. 3880-3882 Vt. Stat. requiring railroads to fence are amended by Vt. Laws 1906, No. 120. Railroads required to fence outside municipalities by Wash. Laws 1907, Ch. 88. Railroads are required to fence and made liable for killing of live stock on failure to do so by Wy. Laws 1907, Ch. 84.

Sec. 180. Liability of railroad for failure to fence. For the liability of a railroad for failure to maintain gates in its fence required by Code Sec. 2057, see *Claus v. Chicago Great Western Ry. Co.*, (Ia. 1907) 111 N. W. 15. "The test of the railroad's liability is not whether the result might have been foreseen, but whether the injury is the natural and proximate consequence of the failure to properly fence in connection with the operation of the railroad," *Mikesell v. Wabash R. Co.*, (Ia. 1907) 112 N. W. 201. Under Revisal 1905, s. 2601 a railway company was sued for failure to erect cattle guards at the entrance and exit of an enclosed pasture, and a verdict for damages was returned, although the lot was a small two acre lot, *Shepard v. Suffolk & C. R. Co.*, 140 N. C. 391, 53 S. E. 137. Under Wis. Rev. St. 1898 Sec. 1810 a railroad is not liable for an injury to a child on an unfenced portion of its way where the accident was due solely to acts of trespassers, *Paquin v. Wis. Cent. Ry. Co.*, 99 Minn. 170, 108 N. W. 882.

FIRES

Sec. 181. Liability of one starting fires—Statute prohibiting fires. Where an owner starts a fire on his premises he is liable for its spreading to the land of another and causing damage by burning down the buildings on the adjacent property, and when he claims that the spreading of the fire was due to a sudden and unexpected shift of the wind, it must be proved that this shift of the wind was extraordinary and not to be expected by a reasonable man, *Mahaffey v. J. L. Rumbarger Lumber Co.*, 61 W. Va. 571, 56 S. E. 893. In an action for damages due to the setting of a fire on adjoining premises it is proper to charge the jury that the defendant, in setting fire to rubbish on his premises, should use the usual

precaution which a prudent man under like circumstances, having a knowledge of the facts as they existed, and knowing the danger, would and should exercise and use, *Allen v. Bainbridge*, 145 Mich. 366, 108 N. W. 732.

Penal Code 1895 s. 229-232 construed and the court decided that the prohibition to start fires on land without notice, only applied to large tracts of waste land where the danger of the spread of fire was tremendous, and not to restricted areas devoted to husbandry, *Acree v. State*, 122 Ga. 144, 50 S. E. 180.

Sec. 182. Damages—To Trees. If a railroad company set fire to a factory, the owner might recover definite prospective profits on a contract beside the value of the property destroyed, *A. F. Johnson & Son v. Atlantic Coast Line Ry. Co.*, 140 N. C. 574, 581, 53 S. E. 362. Pol. Code §3344, which provides a penalty of treble damages in case an owner negligently sets out fire on his land, and allows it to spread to his neighbors property, was construed, *Sampson v. Hughes*, 147 Cal. 62, 81 Pac. 292.

For the destruction of standing trees defendant is liable for their difference in value, before and after the fire, as standing timber, *Union Pac. R. Co. v. Murphy*, (Neb. 1906) 107 N. W. 757. When an adjoining owner's orchard containing 800 or 900 trees was injured by a fire caused by the defendant's railroad and one of the defendant's witnesses testified that each tree was damaged to the amount of \$2.50, and after the fire the railroad's assessors found the damage was \$2,461, a verdict of \$2,000 was not excessive. The measure of damage was not the difference in value of the whole farm after the fire, but the difference in value of the trees injured. The plaintiff owed the railroad no duty to prevent grass, weeds or brush from growing up along its right of way, *Louisville & N. R. Co. v. Beeler*, 31 Ky. Law. Rep. 750, 103 S. W. 300.

Sec. 183. Liability of railroad—In general—Agreements limiting. Railroad companies are made liable for damages caused by fire resulting from the operation of their roads by Ark. Laws of 1907, No. 141. Where a railroad company negligently caused by fire the destruction of the fences and ornamental trees on the land of the plaintiff damages were

awarded, *Louisville & N. R. Co. v. Kohlruess*, 124 Ga. 250, 52 S. E. 166. A railroad was held liable for a fire set by sparks from one of its engines igniting litter which spreading therefrom burned the property of the plaintiff, *Southern Ry. Co. v. Horine*, 121 Ga. 386, 49 S. E. 285.

Agreements limiting liability. A railroad may, by contract with one to whom it sells land for an elevator, limit its liability for setting fires, *James Quirk M. Co. v. M. & St. L. R. Co.*, 98 Minn. 22, 107 N. W. 742. When a railroad allows the erection of a warehouse on a part of its right of way and the tenant agrees that he "will save and hold harmless the company from all damage," etc. * * * "by fire * * * whether the same should be attributable to the negligence of the employees or not;" the railroad was not liable for fire presumably caused by sparks from the trains, *Blitch v. Central of Georgia R. R.*, 122 Ga. 711, 50 S. E. 945. A clause in a lease by a railroad company of part of its right of way exempting the lessor from liability for damages due to fire caused by the negligence of the lessor was held not void as contrary to public policy but applicable to a building totally destroyed which was located partly upon the leased premises and partly on those adjoining, *Mansfield Ins. Co. v. Cleveland R. Co.*, 74 Ohio St. 30, 77 N. E. 269.

Sec. 184. Liability of railroad—Contributory negligence. When there are several sources from which a fire may have started, part of which may be due to the negligence of the plaintiff, a railroad company is not liable for a fire presumably set by sparks from an engine, *Chesapeake and O. Ry. Co. v. Heath*, 103 Va. 64, 48 S. E. 508. Although a fire was burning on the railroad right of way started by a passing engine and the fire spread to a barn owned by the plaintiff, it might be negligence on the part of the plaintiff to leave a large door open toward the right of way with full knowledge of the fire and doing nothing to prevent the burning of his barn and an instruction to this effect which left the question of contributory negligence for the determination of the jury was valid, *Brown v. Oregon R. & Nav. Co.*, 41 Wash. 688, 84 Pac. 400.

Sec. 185. Liability of railroad—Use of spark arrestors—Management of engine.

Spark arresters. Burden of proof where spark arrestors are used, see post §186. Although the plaintiff's property did not adjoin a railroad but the fire spread across several tracts of intervening land, the railroad was liable when the fire was started on account of the failure to provide proper spark arrestors, *Phillips v. Durham & Co.*, 138 N. C. 12, 50 S. E. 462. Sparks from an engine damaged the plaintiff's pastures and fences by starting a fire. Although a witness testified that the railroad company had adopted the most improved type of spark arrestors, this was no defence unless it was proved that the particular engine which caused the fire was thus equipped, *Southern Ry. Co. v. Puckett*, 121 Ga. 322, 48 S. E. 968. Where in an action for damages due to a fire set by a locomotive the plaintiff had established a *prima facie* case by proving that the locomotive actually started the fire it was for the jury to decide whether the *prima facie* case was upset by the evidence of the railroad company that they had done all the law required in the equipment and management of the engine, *Illinois Cent. R. Co. v. Bailey*, 222 Ill. 480, 78 N. E. 833. Although a railroad had its engines equipped in a proper manner with the latest type of spark arrestors, the company was liable for the destruction of the plaintiff's haystack and barn when the fire started on the defendant's right of way, where combustible material had been allowed to accumulate and the fire was then blown by the wind in a broad path to the plaintiff's haystack and barn which were consumed, *Hawley v. Sumpter Valley Ry. Co.*, (Ore. 1907) 90 Pac. 1106. An allegation in a complaint filed in an action to recover damages for a fire set by the defendant's locomotive that its negligence consisted of an omission to use a safe and sufficient spark arrestor, in operating its locomotive with the trapdoor down, thereby increasing the draft, and in operating the locomotive with an unusual pressure of steam; each and all such acts having caused great quantities of dangerous coals to be emitted from the smokestack which set the fire; was held to sufficiently set forth a cause of action. A further allegation, therefore, that the plaintiff had had no opportunity to examine the locomotive or spark arrestor which was in the defendant's exclusive control, was immaterial. So also was an allegation of fact showing

that it had notice or knowledge of holes in the arrestor. An instruction to the jury, however, that under the circumstances the railroad was required to use "a greater degree of care" was erroneous because it might be understood to imply something more than ordinary care, *Lake Erie Ry. Co. v. Ford*, 167 Ind. 205, 78 N. E. 969.

Management of engine. A charge to a jury that if a certain fire which burned up the plaintiff's cotton was caused by the defendant's locomotive the plaintiff had to show nothing further until the defendant established that the engine was properly built, not in a bad or defective condition, and the throwing of the sparks was not caused by unskillful and careless management; and that even then the plaintiff might disprove such evidence was a proper charge, *Alabama G. S. Ry. Co. v. Sanders*, 145 Ala. 449, 40 S. 402. If a particular type of locomotive is used by a company constructing a logging road which emits a great many sparks, which will probably set fire to the plaintiff's white pine timber, causing irreparable damage, a temporary injunction will be granted, *Marion C. Lumber Co. v. Tilghman L. Co.*, 75 S. C. 220, 55 S. E. 337.

Sec. 186. Liability of railroad—Negligence—Evidence—Burden of proof—Pleading.

Negligence in leaving combustibles on or near track. If a railroad permits its right of way to remain in an inflammable condition so that a spark escaping from a passing train starts a fire which spreads and burns the plaintiff's property, the railroad is negligent, *Knott v. Cape Fear & N. Ry. Co.*, 142 N. C. 238, 55 S. E. 150. Although the employees of a railroad were not negligent in their operation and the equipment was not defective, the company was liable for the burning of wheat, when the fire was caused by the company's negligence in allowing combustible material to accumulate on its right of way, *Fireman's Fund Ins. Co. v. Northern Pac. R. Co.*, (Wash. 1907) 91 Pac. 13. It is a question for the jury as to whether or not it was a physical impossibility for sparks from an engine to ignite an empty car. But in an action against a railroad for damages due to a fire alleged to have been started by sparks which set the empty car on fire and then spread to the plaintiff's property the jury should not be instructed to find for the plaintiff if the railroad were negligent in leaving the car on the track irrespective of how the fire started, *Cincinnati Ry. Co. v. Cecil*, (Ky. 1906) 90 S. W. 585. The agents of a

railroad line placed a car used as a cook car on a side track near a wooden building of the Planter's Warehouse Co., that was stored with inflammable materials; a fact that should have been known to the defendant, the material having been stored in the building from the cars of the defendant. A fire negligently attended was started in the cook stove of the cook car, spread to the car, communicated itself to the Planter's Warehouse, and thence to the property of the plaintiff, who alleges negligence on the part of the defendant in failing to move the burning car away from the warehouse to a place where there would be no danger to adjacent property. It was error to grant a nonsuit in this case, *Talmadge v. Central of Georgia Ry. Co.*, 125 Ga. 400, 54 S. E. 128.

Stopping or delaying a train to put out a fire, which may have been set by a locomotive engine of the company, might throw the train out of its schedule time and thus interfere with that of other trains and greatly incommode and even endanger the lives of passengers. The primary duty of the railroad is to the state, therefore, not to the landowner whose land is on fire, *Pittsburg & C. Ry. Co. v. Brough*, 168 Ind. 57, 81 N. E. 57.

Evidence examined in an action against a railroad for burning the plaintiff's house and barn and held to sustain a verdict for the plaintiff, *Cleveland Ry. Co. v. Hayes*, 167 Ind. 454, 79 N. E. 448. In a trial for damage by a fire negligently started from a locomotive, the evidence that the same engine set fire to grass near the time of the alleged burning was admissible, *Hendricks v. Southern Ry. Co.*, 123 Ga. 342, 51 S. E. 415. When a railway company is charged with setting fire to cotton, the evidence of the train despatcher's sheet concerning the time the train passed is admissible, and is not barred as hearsay. For a full discussion see, *Firemen's Ins. Co. v. Seaboard Air Line Ry.*, 138 N. C. 42, 50 S. E. 452. Where there was no evidence as to what particular railroad engine started a fire evidence is admissible regarding the setting of fires both before and after the fire in question. To show the force and direction of the wind and the dryness of the ground testimony may be taken as to the finding of partly burned shingles near the premises several days after, *Smith v. Central Vermont Ry. Co.*, (Vt. 1907) 67 Atl. 535.

Burden of proof. In an action against a railroad for damages caused by fire set by an engine the company is not entitled to such an abstract instruction as the following: "If the

evidence fails to establish the origin of the fire, you will find for the defendant," *Monte Ry. Co. v. Phillips*, 80 Ark. 292, 96 S. W. 1060. Under Code Sec. 2056 proof of loss by fire caused by the railroad raises a presumption of negligence which cannot be rebutted by evidence of defendant's due care, *Stewart v. Iowa Cent. Ry. Co.*, (Ia. 1907) 113 N. W. 764. When a railroad company uses the best known spark arrestors, the burden of proof is on the plaintiff to prove that a fire originated on the defendant's right of way owing to negligence in allowing combustible material to accumulate there, *Atlantic C. L. Ry. Co. v. Watkins*, 104 Va. 154, 51 S. E. 172. Under Gen. St. 1894 Sec. 2700 the burden is upon the defendant to rebut the presumption of negligence on its part, on proof by plaintiff that a fire was kindled on his land by sparks from defendant's locomotive, *Continental Ins. Co. v. C. & N. W. Ry. Co.*, 97 Minn. 467, 107 N. W. 548. Proof that an engine passed near inflammable material immediately before the discovery of fire, there being no evidence to explain its origin, justifies a jury in inferring that the fire originated from sparks from the engine. A *prima facie* case for the plaintiff is thus made out and it then devolves upon the railroad to exonerate itself by showing that it had exercised reasonable care in providing its engine with the most approved appliances and contrivances in general use by railroads throughout the country for the prevention of the escape of sparks and that said appliance and contrivances were in good condition, *St. Louis Ry. Co. v. Coombe*, 76 Ark. 132, 88 S. W. 595.

A complaint in an action for the destruction of the plaintiff's barn by fire emitted from the defendant's engine which alleged that the defendant negligently and carelessly omitted to exercise care proportionate to the increased risk caused by the prevailing high wind and drought, but negligently ran its locomotive at an unusual and excessive rate of speed under an excessive pressure of steam, causing great and unusual quantities of dangerous sparks to be emitted, which sparks the defendant negligently and carelessly permitted to be so emitted, thrown, carried and spread by the wind off of the defendant's right of way and on to the plaintiff's barn, igniting and setting fire to the same, was held demurrable, because the only charge of negligence was operating the engine at a high speed which was not an invasion of the rights of the plaintiff, *Lake Erie & W. R. Co. v. McFall*, 165 Ind. 574, 76 N. E. 400.

FISH AND GAME

Oyster rights, see *post* §623.

Sec. 187 Regulation of hunting and fishing.

Statutes regulating fishing. Acts 1905 c. 292, sec. 8, 9, upheld in *Daniels v. Hower*, 139 N. C. 219, 51 S. E. 992. Laws 1899, p. 197, c. 117, s. 4, relating to fish traps in the Columbia River, was construed, *Gile v. Baseel*, 38 Wash. 212, 80 Pac. 437. N. Y. Laws 1900, p. 51, c. 20, as amended, which authorizes the forest, fish, and game commission upon request of the town board of a town in which fish have been placed at state expense to prohibit fishing therein for not exceeding five years, construed, *People v. Worden*, 187 N. Y. 322, 79 N. E. 1013. The licensee acting under a state license to fish was upheld in his privilege in *Whitehead v. Cape Henry Syndicate*, 105 Va. 463, 54 S. E. 306. Laws of 1905, p. 1022, c. 824, prohibiting fishing in Bear Creek with traps from the mouth to the mill seat, were construed as meaning "mill site," and fish traps fifteen or twenty yards below the mill were prohibited, although they were allowed on the sheeting of the mill itself, *State v. Sutton*, 139 N. C. 574, 51 S. E. 1012.

Fish are *feræ naturæ*. They are incapable, until actually taken, of absolute ownership, except in artificial lakes or in small ponds that are entirely land locked. In all running streams, large lakes, small lakes with outlets into other waters, the right of the state to regulate the time, the manner, and the extent of the taking of fish is unquestioned. It is part of the police powers of the state and has never been turned over to the Federal Government, *Ex Parte Fritz*, 86 Miss. 210, 38 S. 722.

Private Ponds. Sess. Laws (Idaho) 1905, p. 258, were construed as not permitting the sale of trout from private ponds built on brooks or streams where such trout naturally abounded, *State v. Dolan*, 11 Idaho, 256, 81 Pac. 640. Sess. Laws, 1903, p. 189, amended by the Acts 1905 (Sess Laws, p. 258), relating to the establishment of private stocked fish ponds was construed as granting an owner of a stocked pond a right of action if the fish are set free, provided such pond did not naturally abound in the fish, *Sherwood v. Stephens*, (Idaho 1907) 90 Pac. 345.

Sec. 188. Constitutionality of statutes regulating. Hurd's Illinois Rev. St. 1905, p. 1114, c. 61, section 25, providing that no person shall hunt for wild animals with a gun without a license and then only at certain periods of the year, is constitutional, *Kyle v. People*, 226 Ill. 619, 80 N. E. 1081. Sess. Laws 1903, p. 233, c. 112, granting the public a right of way over any land in order to fish from any of the streams, is unconstitutional and void as it is a taking of private property without compensation, and a fisherman was not allowed to enter upon private property and fish against the wishes of the owner, *Hartman v. Tresise*, 36 Colo. 146, 84 Pac. 685. Under Acts 1905, c. 292, sec. 8, 9, the plaintiff had his nets confiscated when fishing in the spawning season, but as the violation was admitted there was no remedy, and the statute was held to be constitutional, *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992. By Code Pub. Gen. Laws art. 72, s. 8, oysters may not be removed from beds when they are immature or less than 2½ inches from hinge to mouth, or containing more than 5 per cent. of shells and it is applicable to private oyster beds as well as to the natural beds. It is not a violation of the constitution prohibiting the taking of private property without compensation as it is merely a reasonable regulation of the taking of oysters and within the State's Police power, *Windsor v. State*, 103 Md. 611, 64. Atl. 288.

FIXTURES

Sec. 189. In general. Certain instructions to the jury as to the distinction between fixtures and personalty in a replevin suit were held correct, *Lord v. Rowse* (Rowse, petitioner,) 195 Mass. 216, 80 N. E. 822.

Sec. 190. Machinery.

Equipment of brewery, pump in dry dock, gasoline engine, see *post* §194.

A mortgagee whose security is a mill, taken without regard to the value of the machinery, may not prevent the removal of new machinery, intended for installation in the mill but not attached and the title to which has not passed to the mortgagor, *First Commercial & Savings Bank of Wyan-*

dotte v. Trenton Milling Co., 144 Mich. 188, 107 N. W. 1107. In cotton and woolen mills all machinery actually affixed to the freehold, although only by screws or bolts, or connected with it by belts or bands, passes with the realty. With the corpus of fixed machinery passes all that properly belongs to and forms an integral part of it, although capable of being detached and used elsewhere. In case a given article, from its nature or use, is part of a fixture, so are also all duplicates and different patterns of the same, used for the same purpose, although capable of being detached and used elsewhere. A valuable discussion of the previous decisions, *Equitable Guarantee & Trust Co. v. Knowles*, (Del. 1896), 67 Atl. 961.

Casing of oil well. A contractor furnished the casing for an oil well to a lessee who had the right under his lease to remove fixtures at any time, and when the lessee abandoned the lease, the contractor sold the casing to the plaintiff after obtaining judgment against the lessee. The lessor sold the oil lands to the defendant about a year later, but the defendant had no right to prevent the plaintiff's taking the casing of the oil well which he had purchased from the contractor unless he paid a fair valuation for it, *Churchill v. More*, (Cal. 1906), 88 Pac. 290.

Sec. 191. Building. A sale of a laundry so attached to land as to be a part thereof operates as a severance and is not within the statute of frauds. *Finney v. Lucy*, (Ala. 1905), 39 S. 583. A property was leased as a game preserve and the lessee erected a building which was occupied by the game keeper and also a stable with rooms in the house which were occupied by the lessee and his guests when they went shooting. Under Civ. Code 1019 the tenant was entitled to remove the house and barn before the expiration of his lease, *O. L. Shafter E. Co. v. Alvord*, 2 Cal. 602, 84 Pac. 279.

Sec. 192. Equipment of dwellings—Mirrors. The seller of a house in which there were large mirrors anchored to the walls, reserving a seller's lien, is not precluded from claiming they were part of the realty by the fact that she negotiated with the buyer for their purchase. When wrongfully severed she could elect to adopt the act, treat them as personalty and sue for their recovery or sue for damages to the land, *Trulock v. Parse*, (Ark. 1907), 103 S. W. 166.

Parol evidence is admissible to show that mirrors, permanently bolted to the walls of a home, and mentioned in a contract for its sale, were regarded by the parties as part of the house, *Martin v. Ferguson*, 31 Ky. Law Rep. 590, 103 S. W. 257.

Sec. 193. As between landlord and tenant. Gamekeeper's house and stable erected by lessee properly removed by him, *O. L. Shafter E. Co. v. Alvord*, 2 Cal. App. 602, 84 Pac. 279. When an oil lease contains a provision, that fixtures may be removed at any time, they may be removed within a reasonable time after the forfeiture of the lease, *Garthan v. Hickman*, 56 W. Va. 75, 49 S. E. 14. It is for the jury to say whether a tenant may remove from a building hired by him a furnace which he put in five and a half years before the termination of his occupancy, *Baringer v. Evenson*, 127 Wis. 36, 106 N. W. 801. When a tenant was evicted by the sheriff in consequence of non-payment of the rent, he made no effort to take with him an ice chest and front and back bar which were fastened to the wall and floor of the building, and he made no demand for these fixtures. The mortgagee had the sheriff forcibly remove this property, but his rights were no greater than the tenant's, and as the tenant had lost all right to remove the property by leaving it on the premises after giving up possession, the mortgagee had no right to take the property, and he was compelled to pay the judgment for the value of the fixtures wrongfully removed, *Rash v. Havird Sheriff et al.*, 12 Idaho, 352, 86 Pac. 529.

Sec. 194. As between mortgagor and mortgagee.

Rights in machinery, see further, *ante* §190.

A mortgage of a brewery must be held to cover storage tanks, etc., from the simple fact that they are necessary for its use as such, *Dehring v. Beck*, 146 Mich. 706, 110 N. W. 56. A sawmill and its machinery intended to be used permanently and not adapted to any other use are permanent fixtures as between mortgagor and mortgagee although the mill site was subject to overflow from a river, *Humes v. Higman*, 145 Ala. 215, 40 S. 128.

Rights of conditional vendor. Where a dry dock mortgaged its plant and then purchased on credit by a conditional sale a pumping plant which was put into the mortgaged premises, but the title to which remained in the sellers, upon a fore-

closure of the mortgage the pumping plant should not be sold, *Washington Trust Co. v. Morse Iron Works & Dry Dock Co.*, 187 N. Y. 307, 79 N. E. 1022. A seller of a gasoline engine who retained title upon a sale thereof in instalments did not lose title because the buyer so attached it to a mill which he had bought upon credit that "under ordinary circumstances" it would have become a part of the realty. His rights are not affected by the provisions of the contract between the buyer and the seller of the mill that all machinery placed thereon should become part of the realty. Under N. Y. Laws 1897, p. 542, c. 418 (Lien Law), however, the seller of the machine could only recover the amount unpaid upon the machine at the date of its conversion by the buyer's successor, *Davis v. Bliss*, 187 N. Y. 77, 79 N. E. 851.

FLATS

See *Waters*.

FORCIBLE ENTRY AND DETAINER

See further, *Actions, Ejectment*.

Sec. 195. In general—Who may bring—Issues.

"At common law forcible entry and detainer were distinct actions—criminal and not civil," and "the statute providing for their trial as civil actions confined them to two conditions of fact—The one when a tenant wrongfully held over after the expiration of the term and refused to surrender after demand, and the other when a stranger by force and violence wrongfully and unlawfully gained possession. The question of title is not involved in this action, and is immaterial, except so far as tending to show the plaintiff's right of present possession," *Folsom v. Hunter*, (Indian Terr. 1906) 98 S. W. 156.

By landlord. Where the plaintiffs had conveyed by a deed to the defendants the right for three years to remove certain standing timber the relation of landlord and tenant was created and at the expiration of the three years the plain-

tiffs could maintain forcible detainer to recover possession, *Alexander v. Gardner*, (Ky. 1906) 96 S. W. 818. Where the plaintiff in an action for forcible entry and detainer had been in possession of the premises, an island, for several years through a tenant who had just vacated, a new one being daily expected, and the defendant came and squatted on the island, the plaintiff was in actual possession and could maintain the action, *McCormick v. McDowell*, (Ky. 1906) 90 S. W. 541.

Assignee of landlord. Where pending a suit in unlawful detainer the landlord assigned his interest therein, the assignee became landlord and the rights and liabilities of the tenant were not affected, *Ellis v. Cross*, (Indian Terr. 1906) 97 S. W. 1030.

A tenant who after allowing the defendant to enter without the landlord's permission reentered himself can sue the defendant in forcible detainer when the latter retakes possession by force, *Brown v. French*, (Ala. 1906) 42 S. 409.

Vendor and vendee. When a lease contained an agreement to vacate within a reasonable time after a sale an action of unlawful detainer could only be brought in the name of the seller for the use of the buyer, *Cooper v. Gambill*, 146 Ala. 184, 40 S. 827. When a purchaser did not sign the agreement of sale and paid no part of the price his widow and statutory heir remaining in possession after the date fixed for the payment of the purchase money, who refused to restore the land, pay the purchase price or the rent, could be ousted from possession by the seller in unlawful detainer proceedings although he tendered no conveyance, *Bowling v. Bowling*, 88 Miss. 144, 40 S. 871. A. owned a house on which a mechanic's lien was foreclosed, and B. the purchaser at a sheriff's sale, said that he was purchasing the property for the benefit of A., who at all times claimed to own the property. B.'s heirs had no ground to maintain an action for unlawful detainer against A., as she had held the property under claim of right from 1893 when the deed was executed until 1905, when the suit was brought, and had never paid any rent so the relation of landlord and tenant had never existed, *Meyer v. Beyer*, 43 Wash. 368, 86 Pac. 661.

Issues. In forcible entry and detainer only the right of possession, not the right of entry or property, is in issue, *Engle v. Tennis Coal Co.*, 30 Ky. Law Rep. 1269, 101 S. W.

309. In forcible entry and detainer before a justice of the peace neither title nor the right of entry or possession is involved. Upon appeal under Alabama Code 1896, section 2149, the action becomes one of statutory ejectment. Such an action will not lie in favor of one forcibly excluded from the enjoyment of an easement, *Moye v. Thurber*, 146 Ala. 180, 40 S. 822.

What is forcible entry? When the plaintiffs were in possession and the defendant forcibly took possession though forbidden by the plaintiff's agent there was a forcible entry within the meaning of the Kentucky Code, *Check v. Reiter*, (Ky. 1907) 102 S. W. 287. When the owner of a property in possession of another by sufferance who does not pay rent, peaceably unlocks the door in plaintiff's absence, and takes off the lock and puts on one of his own, he is not guilty of forcible entry and detainer, *State v. Leary*, 136 N. C. 578, 48 S. E. 570.

Sec. 196. Defences. Under the Alabama Code 1896, section 2126, an action of forcible detainer lies against one who enters peaceably upon premises in the possession of another, and by unlawful refusal keeps the party out of possession. The defendant therefore should be allowed to show that he moved in and was holding under a lease from the owner, *Sprouse v. Story*, 144 Ala. 542, 42 S. 23. A landlord who pending forcible detainer proceedings began a civil action to recover for one year's future rent accruing under a contract was not allowed to proceed further with the forcible detainer action, *Rich v. Rose*, (Ky. 1907) 99 S. W. 953.

Sec. 197. Practice—Statutes. Various questions of practice in an action for forcible entry and detainer, discussed and decided, *Cooley v. U. S. Savings & Loan Co.*, 144 Ala. 538, 39 S. 515.

Supersedeas bond. Alabama Code 1896, sections 2145 and following as to a supersedeas bond in forcible entry and detainer proceedings, construed, *Helton v. Ft. Gaines Oil Co.*, (Ala. 1905) 39 S. 925. In an action upon a supersedeas bond in unlawful detainer the plaintiff can recover the premises, the amount of the judgment which the bond was given to supersede, with interest, the fair rental value from the date of the judgment, and costs, *Ellis v. Cross*, (Indian Terr. 1906) 97 S. W. 1030.

Pleading, Variance. Mansfield's Indian Territory Digest section 3351 and 5055 as to pleadings in an action for forcible entry and detainer, construed, *Wilson v. Smith*, 6 Indian Territory 108, 89 S. W. 1099. In the Indian Territory the fraudulent execution of a lease may be shown by oral proof in an action of unlawful detainer, although no allegation of fraud was set up in the pleadings. Fraud in the execution of an instrument renders it absolutely void as to the party guilty of the fraud, *Sass & Crawford v. Thomas*, 6 Indian Territory 60, 89 S. W. 656. Where a petition in unlawful detainer proceedings alleges that a certain person owned the land before it was sold under a deed of trust and conveyed it to the plaintiff, it is not admissible to offer evidence by the plaintiff that the latter was, during the whole period stated, the beneficial owner, *McFarland R. E. Co. v. Gerardi Hotel Co.*, 202 Mo. 597, 100 S. W. 577.

Notice to quit. Although no notice to quit or surrender possession had been given as required by B. & C. Comp. §5390, a waiver of such notice by the tenant in the lease, renders such notice unnecessary and the landlord has a right to bring an action for forcible entry and detainer, *Wolfer v. Hurst*, 47 Or. 156, 82 Pac. 20.

Statutes. The form of judgment, manner of assessment of damages and satisfaction of the execution are prescribed by Cal. Stat. 1907, Ch. 37, amending Sec. 1174 of the Code of Civil Procedure. Mansfield's Indian Territory Digest, section 3362, as to damages in a suit for unlawful detainer, construed, *Ellis v. Cross*, (Indian Terr. 1906) 97 S. W. 1030. 30 Statutes 495 c. 517 (The Curtis Act) construed and held not to change the nature of the action of forcible detainer from a law action to a bill in equity, *Sharrock v. Kreiger*, (Indian Terr. 1906) 98 S. W. 161. Kentucky Civil Code Practice section 492 as to forcible detainer by a tenant construed together with Kentucky Statute 1903, section 2292 as to forfeitures of leases by assignment, *Haase v. Schickner*, (Ky. 1906) 92 S. W. 949. Mississippi Ann. Code 1892, c. 142, as to practice in unlawful entry and detainer proceedings, construed, *Paden v. Gibbs*, 88 Miss. 274, 40 S. 871. The conditions upon which change of venue is permitted are specified in Mo. Laws 1907, p. 276. The enforcement of judgments in forcible entry and detention is provided for by Neb. Laws 1907, Ch. 163.

Shannon's Tennessee Code section 5093 as to unlawful detainer of land, construed, *Shepperson v. Burnette*, 116 Tenn. 117, 92 S. W. 762.

FRAUDULENT CONVEYANCES

Conveyances induced by fraud or undue influence, see *ante* §§88-90.

Fraudulent conveyances as affected by the bankruptcy act, see *ante* §24.

Sec. 198. Giving debtor false credit. Where a bank president executed conveyances to it of almost all his property but the bank at his request for over seven years failed to record them and did not in fact file them for record until two days before he died with instructions to the clerk to record them only upon his death, a finding was correct that they were withheld in order to give him a fraudulent credit and the bank's claim thereunder must therefore be postponed to that of his own creditors without notice of the conveyances, *Robertson & Co. v. Columbus Ins. & Banking Co.*, 85 Miss. 234, 38 S. 100. Where a grantor fraudulently attempted to place his property beyond the reach of his creditors and the grantee knew of the business difficulties of the grantor, and through family considerations failed to disclose the same, or to record the deeds; thus leaving the grantor in the possession of the properties, in no wise accounting therefor to the grantee, paying the taxes in the name of the grantor, also insuring the buildings in his own name and for his own use, it was decreed that the property be sold for the benefit of the trustees in bankruptcy of the vendor on the ground that a vendee who puts it in the power of a vendor to commit fraud must bear the consequences, *Moore v. Yearney*, (W. Va. 1907) 57 S. E. 263.

Sec. 199. Conveyances for support of grantor. A person cannot as against his creditors, prior or subsequent, settle his property in trust for himself for life, and over to his appointees by will, and in default of such appointment, to the use of his lawful heirs in fee, *Nolan v. Nolan*, (Penn. 1907) 67 Atl. 52. A conveyance to a married woman by one who is

on his death bed of all his property in consideration of love and affection and the grantee's promise to support the grantor during his lifetime will be held to be void at the suit of the grantor's creditors, *Wood v. Potts & Potts*, 140 Ala. 425, 37 So. 253. A contract of a husband and wife conveying all the former's property (which was community property) to one who agrees to care for the grantors for the remainder of their lives is void as to the whole and may be set aside by the husband after the death of the wife, *Harris v. Wafer*, 113 La. 822, 37 So. 768.

Sec. 200. Conveyances between near relatives. A conveyance to a brother was found fraudulent in *Fidelity Nat. Bank of Spokane v. Adams*, 38 Wash. 75, 80 Pac. 284. The defendants in a suit mortgaged their property to their sisters and continued to use it but as the mortgage was evidently in fraud of their creditors it was void, *McCauley v. Shockey*, (Md. 1907), 66 Atl. 625. When an insolvent debtor upon being sued makes what purport to be sales of almost all his salable land to a brother-in-law who lived with him and had been for years in his employ but was not shown to have the means to make the purchase, the sales are fraudulent conveyances, *Brewery v. Holzner*, (La. 1906) 41 S. 48. Where an insolvent purported to sell his son-in-law land for cash, and a few days later paid an unsecured note due by the seller to the buyer the transaction amounted to a fraudulent conveyance. *Provosty J. dissenting, New Orleans Acid Co. v. Guillery & Co.*, 117 La. 821, 42 S. 329.

Where the grantor made a deed to his children of land, and did not retain enough property to pay his debts outstanding at the time of the conveyance it was held to be a fraudulent conveyance under N. C. Code 1547 especially when the homestead exemption of \$1,000 and the personal exemption of \$500 were considered, *Williams v. Hughes*, 136 N. C. 58, 48 S. E. 518. A quitclaim deed by a co-maker of a note to his children for a recited consideration less than its value, which thereby rendered the grantee insolvent, constitutes a fraudulent conveyance, *Southern Bank v. Nichols*, 202 Mo. 309, 100 S. W. 613. Where a brother makes a deed to his sister and it is proved that she really holds the property for him in order to defeat the claims of his creditors, the deed is void against

the claim of a subsequent creditor, *Bainbridge v. Allen*, 70 N. J. Eq. 355, 60 Atl. 706.

Not fraudulent. The fact that a daughter kept house for her father and nursed him during his illness raises no presumption against the validity of a deed from him to her, *Bonsal v. Randall*, 192 Mo. 525, 91 S. W. 475. When a father bought land in his own name paying his daughter's money on the contract to purchase, which was subsequently ratified and approved by her and she also made other payments, an assignment by the father of the contract to his daughter was not a fraudulent conveyance against his creditors, *Gehres v. Wallace*, 38 Wash. 101, 80 Pac. 273.

Sec. 201. Conveyances in fraud of marital rights.

Where a husband, two days before marriage, secretly and without valuable consideration conveys real estate to his children by a former wife, reserving to himself a life interest, this is a fraud on the dower rights of his wife, *Wallace v. Wallace*, (Iowa 1908) 114 N. W. 913.

When in a petition for separate support brought by a wife under Mass. Rev. Laws c. 153, section 33, she obtains a final decree for the payment of money to her by her husband, she acquires a right as creditor to levy upon his property for the satisfaction of her decree; and this gives her the right to avoid a precedent conveyance made by him for the fraudulent purposes of preventing her from obtaining such satisfaction, *Shepherd v. Shepherd*, 196 Mass. 179, 81 N. E. 897. Where pending a suit by a wife for divorce, a mensa et thoro, and maintenance for herself and children the husband conveyed land for an inadequate consideration, to the wife of the husband's brother the grantee and her husband knowing at the time of the purchase of the pending litigation, and that the house and lot was all the property the husband owned, a finding that the conveyance was made with intent to deprive the plaintiff of maintenance and that of such intent the grantee had notice was justified, *Zumbiel v. Zumbiel*, (Ky. 1906) 96 S. W. 542.

A voluntary conveyance made by a widower in contemplation of marriage, although with no particular woman in view, is in fraud of any person he may later marry and may be set aside at her behest, *Higgins v. Higgins*, 219 Ill. 146, 76 N. E. 86. A widow may not have a conveyance by her hus-

band to his son set aside for fraud if made when he was not engaged, though he had previously offered himself to her and had been rejected and was endeavoring to secure a wife, *Beechley v. Beechley*, (Ia. 1906) 108 N. W. 762.

Evidence examined and held not to show that a certain conveyance made by the deceased before his marriage was in fact in fraud of his later wife's rights of dower, *Collings v. Collings*, (Ky. 1906) 92 S. W. 577.

Sec. 202. Conveyances by husband to wife—When void as to creditors.

As to conveyances between husband and wife valid as to subsequent creditors, see *post* §209.

A husband's creditors are entitled to land bought by his wife with proceeds of her interest in his real estate conveyed by both, *Sharff v. Hayes*, 132 Ia. 609, 110 N. W. 24. Mississippi Code 1892, section 2294 as to the rights of a creditor in case of an unrecorded conveyance between husband and wife, construed, *Green v. Weems*, 85 Miss. 566, 38 S. 551. Under Civ. Code 3439, a transfer of property with the intention to defraud creditors is void, and when a husband transfers his property to his wife's name on the day a judgment is entered against him, the creditors may levy on the property as if no transfer were made, *Bekins v. Dieterle*, (Cal. 1907) 91 Pac. 173. A deed by an insolvent husband to his wife without consideration was void as to existing creditors although there was no fraudulent intent, *Scharff v. McGaugh*, 205 Mo. 344, 103 S. W. 550.

Burden of proof. When a husband conveys property to his wife the burden of proof rests with her to show that she paid from her own estate a sufficient consideration therefor, and that it was not to defraud the creditors of her husband, *Rankin v. Goodwin*, 103 Va. 81, 48 S. E. 521. In a suit by creditors to set aside a conveyance by a husband to his wife as fraudulent she has the burden of proving that the consideration therefor was bona fide and proportionate to the value of the land conveyed and clearer and fuller proof is required than in the case of strangers, *Southern Lumber & S. Co. v. Verdier*, 51 Fla. 570, 40 S. 676. When a wife asserts as consideration for the conveyance of his property to her a claim of debt against her insolvent husband for money loaned to him many years previous no note or other evidence of the ex-

istence of an agreement to repay being shown to have been executed, and the alleged debt having become stale by long lapse of time, her bare statement is not sufficient proof thereof, *Waters v. Merrit Pants Co.*, Ark. 1905, 88 S. W. 879.

Valid. Where a wife bought at a foreclosure sale land owned by her husband, the purchase was valid even though the husband was in bankruptcy, when the consideration for the conveyance was not derived from the husband, and it was not a fraud on his creditors, *Lewis v. Palmer*, 106 Va. 522, 56 S. E. 341. The conveyance of a homestead by husband to wife, without an intent to defraud his creditors, does not become fraudulent by reason of his taking up his residence in a remote county, shortly afterward, and several months later being joined by his family, *Commercial State Bank of Salem v. Kendall*, (S. D. 1906) 106 N. W. 53. When a husband borrowed from his wife's mother money to use in business on the condition that he should make over the title of certain lots to his wife which he had bought, and on which the mother had erected valuable improvements, the conveyance was not fraudulent when it was not shown that he had children who were injured by the transaction at the time of the conveyance. The creditors, however, were entitled to a claim on the property to the extent of the interest and taxes paid by the husband, *Farr v. Hauenstein*, 69 N. J. Eq. 740, 61 Atl. 147. A husband received certain property from his wife and subsequently he conveyed certain property he owned to his wife for a stated consideration of \$2,500, and the burden of proof was on the husband's creditors to prove that was not a fair valuation for the property for which he was indebted to his wife. A subsequent increase in value of the property conveyed by the discovery of coal did not render the conveyance void as against his creditors, *Ilfeld v. De Baca*, (N. M. 1907) 89 Pac. 244. A husband had obtained advances from his wife on loans to a certain company which made no payments and he guaranteed the loan to his wife. Therefore a deed by the husband to his wife of his property to secure her for this loan and for other advances was valid, when its amount was less than the total of the advances she made him, although the property she held was his own property which he had deeded to her at the time of their marriage without any intention of defrauding his creditors as he entered into no undertakings in which he might be liable for loss for over ten years after-

ward, *Knickerbocker Trust Co. v. Carhart* (N. J. Ch. Eq. 1906) 64 Atl. 756.

Use of wife's earnings. A conveyance by an insolvent husband through an intermediary to himself and wife is in fraud of creditors, though the property was purchased with the wife's earnings, *Lansing State Savings Bank v. Harrington*, (Mich. 1908) 114 N. W. 1030.

Notice. A bill to subject land of a wife to pay a debt of her husband, on the claim that the husband's money paid for it and it was conveyed to the wife with intent to defraud creditors on the part of the husband, must charge notice on the part of the wife of the husband's fraudulent intent, in order to make it a bill for relief on a claim of fraud in fact, *Laidley v. Reynolds*, 58 W. Va. 418, 52 S. E. 405.

Sec. 203. Conveyance from third party taken in name of wife or another. Where title was taken in the name of a wife to land purchased from her own funds and the interest upon the mortgage thereon afterward paid out of the net proceeds of the rents and profits issuing from that place and her homestead, there was no fraudulent conveyance. A wife's property cannot be subjected to the payment of her husband's debts because of augmentation of the rents and profits or enhancement of value on account of any reasonable contribution of his time, labor, or skill in the management of the property. But where the husband, in addition to his wife's farm, operates others in his own right, and mingles the profits and buys more property in her name the burden is on the wife as against his creditors to show that the later purchases were bought from the profits of her farm, not from his own earnings, *Sharp v. Fitzhugh*, 75 Ark. 562, 88 S. W. 929.

St. 1898, Sec. 2077, 2078, providing for proceedings to secure the creditors of a person paying for land the title to which is taken in the name of another, construed, *State Bank of La Crosse v. Bienfang*, (Wis. 1907) 113 N. W. 726.

Sec. 204. Preference of creditors. Under Rev. Civ. Code Sec. 2366 a debtor may prefer a creditor by transferring his property to a corporation for stock and then paying the creditor in stock, *Gardner v. Haines*, 19 S. D. 514, 104 N. W. 244. Under Rev. Civ. Code Sec. 2366 and 2372 a debtor may

prefer certain creditors by executing a trust deed of all his property for the benefit of those who should become parties to it, *Joas v. Jordan*, (S. D. 1907) 113 N. W. 73. When A. had put B. in possession of land, owing him money, and years afterward made him a deed of it, such deed was fraudulent if A. was insolvent all the time even before putting B. in possession of the land, especially if there was no contract to convey, *Ansell v. Cox*, 57 W. Va. 561, 50 S. E. 806. Where a father was indebted to a number of creditors among whom was his daughter, a deed to the daughter of the house and land where they both lived, in consideration of the debt was not invalid although the father continued to live in the house and the property remained assessed to him, and the fire insurance policy on the house was also left in his name. This deed to his daughter preferred her to his other creditors which he had a right to do provided that the conveyance was made in good faith, *Thompson v. Williams*, 100 Md. 195, 60 Atl. 26.

Sec. 205. Property exempt from execution. Where the lower court found that a conveyance was made with intent to cheat and defraud creditors, it will be presumed that the property was not exempt from execution, *Starke v. Lamb*, 167 Ind. 642, 79 N. E. 895.

Sec. 206. Effect of a fraudulent conveyance on parties and privies. When there is actual fraud on the part of both grantor and grantee in a fraudulent conveyance the latter is not entitled to reimbursement for any payments, *Tissier v. Wailes*, (Ala. 1905) 39 S. 924. The children of a decedent who during his life conveyed two tracts of land to his son for the purpose of hindering and defeating his creditors cannot recover the land, *Southwood v. Southwood*, (Ky. 1906) 98 S. W. 304. The heirs of a husband who conveyed his land to a third person in order to defraud his wife of her marital rights cannot get the aid of equity to set the conveyance aside, *Jolly v. Graham*, 222 Ill. 550, 78 N. E. 919. When the plaintiff believing himself about to be wrongfully sued for damages conveyed certain lands to his sister without her knowledge and later when she heard of it she agreed to reconvey them on his request, a court of equity will *not* order a reconveyance, *Carson v. Beliles*, (Ky. 1905), 89 S. W. 208.

Sec. 207. Consideration—Adequacy—Voluntary conveyances. A conveyance by one insolvent brother-in-law to another, the consideration being paid in specie, was held on all the evidence fraudulent, to the knowledge of the grantee, *Brite v. Guy*, (Ky. 1905) 88 S. W. 1069. Evidence examined and held to show that a conveyance was fraudulent to the knowledge of the grantee and without consideration, *Wigginton v. Minter*, (Ky. 1905) 88 S. W. 1082. If a purchaser with notice of a heavy indebtedness against the owner of a mining claim and of a judgment of a large amount purchases the claim for the expressed consideration of "\$1 and other valuable considerations," he can not claim to be a bona fide purchaser when the further consideration is not shown, *California C. M. Co. v. Manley*, 11 Idaho 572, 81 Pac. 50.

Consideration adequate. Evidence held not to show such inadequacy of prices as to charge grantee as trustee for grantor's creditors, *Rosenheimer v. Krenn*, 126 Wis. 617, 106 N. W. 20. A husband loaned \$3,500 without interest to his wife with which to engage in business and without taking any note as security, but with the agreement that his wife should build a house and give it to him. Subsequently she did so, and three years later deeded it to her husband. This conveyance deprived the wife's creditors of security, but the husband was himself a bona fide creditor and therefore she had a right to grant him a preference as the value of the house (\$6,000) was only an adequate return for ten years use and business profit on the \$3,500 originally advanced, *Clarke v. Black*, 78 Conn. 467, 62 Atl. 757.

Consideration inadequate. A deed secured upon a valuation of one-third of the land, of which the grantor actually owned one-half, will be set aside, *Faxon v. Baldwin*, (Ia. 1907) 114 N. W. 40. It was not error for the trial court to find that a conveyance of land inventoried at \$2,700 made by the administrator of an estate represented as insolvent to a purchaser who immediately reconveyed to the administrator, both deeds being for the recited consideration of \$500 but no money having in fact passed, was fraudulent as to a minor heir. As the latter never in fact knew of the sale until after the administrator's death, nothing occurred to put her on inquiry, and as she had only constructive notice of the filing of his account showing the sale, she was not barred by laches, *Manning v. Mulrey*, 192 Mass. 547, 78 N. E. 551.

Voluntary. A conveyance by a man who was in fact insolvent which was voluntary and without consideration is void as against creditors although there was no actual intent to defraud, *James v. Mallory*, 76 Ark. 509, 89 S. W. 472. Judgment creditors of a municipal corporation may file a bill to subject property bought by the corporation but conveyed direct from the seller to a railroad company at the instance of the purchaser, to the payment of their claims. Being a voluntary conveyance of property never used for governmental purposes such a transaction amounts to a fraudulent conveyance, *Southern Ry. Co. v. Hartshorne*, (Ala. 1907) 43 S. 583.

Sec. 208. Statutes. Kentucky Statutes 1903, section 1910 as to fraudulent conveyances, construed, *Julius Locheim & Co. v. Eversole*, (Ky. 1906) 93 S. W. 52. Kentucky Statutes 1903 section 1906, 1907 as to fraudulent conveyances, construed, *Ahlering's Exr. v. Speckman*, (Ky. 1907) 99 S. W. 973. Ky. Statutes 1903, section 1907 as to fraudulent conveyances raises a presumption of fraud as to existing debts, *Standifer v. Baker*, 31 Ky. Law Rep. 42, 101 S. W. 365.

Sec. 209. Subsequent creditors. A conveyance by a man to his wife of his farm at the time, against her wishes, he invested other money in a new business transaction was not fraudulent as to a future creditor under Ky. St. 1903, section 1906, *Peyton v. Webb*, (Ky. 1906) 96 S. W. 839. An insolvent debtor had conveyed all of his property to his mother-in-law, in order to defraud his existing creditors, and under these circumstances subsequent creditors were able to set aside the conveyance and levy on the land conveyed, *Hemenway v. Thaxter*, (Cal. 1907) 90 Pac. 116.

Where during the Civil War a father conveyed property to his eldest son upon a parol trust for all his children a later conveyance by the trustee to the beneficiaries will not be set aside as in fraud of the later creditors of the trustees, *Smith v. Ellison*, 80 Ark. 417, 97 S. W. 666.

Sec. 210. Setting aside—Who may. The holder of a contract of indemnity becomes at once a creditor within the rule against fraudulent conveyances although the contingency upon which liability accrues does not take place until later, *Welch*

v. Mann, 193 Mo. 304, 92 S. W. 98. Where of two joint debtors one was insolvent and made a fraudulent conveyance of his land and the other later became insolvent and was discharged in bankruptcy, the creditor may maintain a bill to set aside the conveyance, Stark v. Lamb, 167 Ind. 642, 78 N. E. 668. It was held that a creditor whose claim "Was created long before and existed at the time of" a fraudulent conveyance could "have the land subjected to its payment," Ahlering's Exr. v. Speckman, (Ky. 1907) 99 S. W. 973. The right of an administrator to bring action for possession of land fraudulently conveyed by the decedent is based in Massachusetts solely on license from the probate court, Tyndale v. Stanwood, 190 Mass. 513, 77 N. E. 481.

Estoppel. For facts showing conduct on part of purchaser of a farm preventing him from rescinding contract on grounds of fraud, see Mestler v. Jeffries, 145 Mich. 598, 108 N. W. 994.

Sec. 211. Setting aside—Burden of proof—Evidence.

As against a creditor the burden is on the near relative who takes the conveyance in consideration of a past due debt to show that the debt was genuine and that he acted honestly and in good faith, Flint v. Chaloupka, (Neb. 1907) 111 N. W. 465. In an action by an administrator to have set aside for the benefit of the creditors of a father's estate, a conveyance to the son, without consideration, made five days before his death, the burden is on the son to show the deed to have been for a valuable consideration, Long v. Garey Inv. Co., (Ia. 1907) 112 N. W. 550. Where in a bill to set aside an alleged fraudulent conveyance the plaintiff's claim is shown to have been in existence at the time of the conveyance, the debtor is insolvent and an execution against him returned "no property found," the burden is upon the grantees to show that they were bona fide purchasers for value, Brunson v. Rosenheim, (Ala. 1907) 43 S. 31.

Firm creditors who seek to set aside conveyances of property owned by individual members have the burden of proving fraud and the insolvency of the partnership. Evidence of these issues examined, Holmes Bros. v. Fergus-McKinney Co., 86 Miss. 782, 39 S. 70.

Statements by a grantor not made in the presence of the grantee and by his attorney are inadmissible as evidence that

the deed was executed in fraud of creditors, *Hargue v. Hayes*, (Ark. 1907), 103 S. W. 163. The fact that the grantor in a conveyance alleged to have been made in fraud of creditors stated to persons other than the grantees that he would deed his land to them if they would hold it for him, is not admissible as against the grantee, as the latter was not present or connected in any way with these transactions, *Perry v. Pore*, (Ky. 1906) 90 S. W. 952.

Sec. 212. Setting aside—Knowledge of grantee.

Notice to wife of fraudulent character of conveyance by husband to her, see *infra*.

In Nebraska fraud on the part of the grantee need not be alleged and proved, *Richardson v. Richardson*, 134 Ia. 242, 111 N. W. 934. If a husband fraudulently made a conveyance to his wife of property with the intention to contract debts afterwards, a purchaser paying a valuable consideration without notice of the fraud has a valid title, *R. M. Sutton & Co. v. Christie*, 60 W. Va. 1, 53 S. E. 602.

Sec. 213. Setting aside—Practice—Exhausting legal remedies. A bill to set aside a chain of conveyances as in fraud of creditors which prays that some grantees living in another county from that in which the land is situated may be held as trustees may be brought in the county where they live, *Chisholm v. Wallace*, 146 Ala. 683, 40 S. 219. The provisions of Alabama Code 1876, section 3886, reenacted in the 1896 Code authorizing a creditor to set aside a fraudulent conveyance are not applicable when the assets conveyed are outside of Alabama, *West Point Min. & Mfg. Co. v. Allen*, 143 Ala. 547, 39 S. 351. When M. executed to G. a conveyance in fraud of his creditors Y. and then conveyed the same land to Y. for \$100 in cash and gave him a mortgage antedating the deed to G. Y.'s only remedy was to have the land sold and the proceeds applied to his former debt, *New v. Young*, 144 Ala. 420, 39 S. 201.

Pleading. A petition to set aside a mortgage and payments thereon as fraudulent within the Kentucky Statutes which fails to allege that the debtor was insolvent or in contemplation thereof or intended to prefer when he made either the mortgage or the payments is insufficient, *Krish & Co. v. Kentucky Jeans Clothing Co.*, (Ky. 1907) 102 S. W. 803.

Exhausting legal remedies. In order to entitle a plaintiff to come into equity to set aside a conveyance it must be shown that he has exhausted his legal remedies against the grantor and the mere existence of unsatisfied judgments against him, upon which no executions have issued does not show that he is insolvent and legal remedies valueless, *Smith v. Ellison*, 80 Ark. 417, 97 S. W. 666.

Sec. 214. Setting aside—Levy and sale on execution. It was held that a creditor who has recovered a judgment against his debtor and levied upon and sold his land fraudulently conveyed by the debtor previous to the judgment can recover possession by an action of ejectment based on the deed acquired at the execution sale, without first going into a court of equity to set aside the fraudulent conveyance, *Ward v. Sturdivant*, 81 Ark. 73, 98 S. W. 690.

Sec. 215. Setting aside—Statute of limitations. When an assignor had made a deed to his brother, who conveyed to another brother in fraud of the creditors of the assignor, a judgment creditor will have a right to begin an action to have the deed set aside, and the statute of limitations does not begin to run against him until after the discovery of the fraud, *Fidelity Nat. Bank of Spokane v. Adams*, 38 Wash. 75, 80 Pac. 284. Where a husband conveys in fraud of the wife's dower the statute of limitations does not begin to run until the death of the husband. Knowledge by the wife of a deed by two of the fraudulent grantees to one of their number does not estop the wife, or commence the running of the statute, *Wallace v. Wallace*, (Iowa 1908) 114 N. W. 913. When a debtor has conveyed property liable for a debt to his children without sufficient consideration in order to defraud his creditors, §2929 [2 Code 1904, p. 1551], requiring a suit to set aside a conveyance of the property of a debtor to be brought within five years, does not apply, *Kinney v. Craig*, 103 Va. 158, 48 S. E. 864.

GAS

See Oil and Gas.

GIFTS

Parol gift of real estate as affected by the statute of frauds, see *post* §508.

When volutary conveyances are fraudulent as to creditors of grantor, see *ante* §207.

Between husband and wife, see *post* §256.

Sec. 216. In general. Where a father delivered to his daughter the following writing: "I present you, on this your thirty-third birthday, with the house and premises now occupied by you" he thereby made an absolute and irrevocable gift under which she took a fee simple, *Barnes v. Banks*, 223, Ill. 352, 79 N. E. 117.

GUARDIANS

See Infants and Insane Persons.

HIGHWAYS

Adverse possession over, see *ante* §21.

As boundaries, see *ante* §28.

Railroad crossings, see *post* Railroads.

Right to take by eminent domain for roads and bridges, see *ante* §119.

Dedication of highway, see Dedication.

Taxes for building, see §539.

Sec. 217. What are. A public highway, as one distinguished from a private highway, is one under the control and kept by the public, dedicated for that purpose by the owner, used by the public for 20 years, or established in a regular proceeding for that purpose, *Dunn & Lallande Bros. v. Gunn*, (Ala. 1906) 42 S. 686. Where the plaintiffs claim that a certain road has been used for over 20 years as a public highway, the defendants denying the same, and also denying the jurisdiction of the county board of commissioners, it was ruled

that under Acts 1902 (23 St. at Large p. 998) the provisions show that it was not the intention to limit the jurisdiction of the supervisor and county board of commissioners over the highways in their county, but simply to declare that roads laid out by virtue of an act of the General Assembly, etc., came within the definition of a highway, *Township Com'rs of St. Andrews Parish v. Charleston Mining & Mfg. Co.*, 76 S. C. 382, 57 S. E. 201.

Sec. 218. Creation of public way by prescription—
Over homestead. The use by the public of a tract along the changing bank of a river is not such use of a defined way as will establish a highway by prescription, *Nelson v. Sneed*, (Neb. 1906) 107 N. W. 255. When a private road had been used over land for a year, the owner could not close it without giving thirty days' notice so that the users might have an opportunity to have it made permanent. Pol. Code 1895, s. 673, *Neal v. Neal*, 52 Ga. 804, 50 S. E. 929. By Rev. St. 1887, S. 851, (Sess. Laws 1893, p. 12 amended) a highway which has been worked and kept up at the expense of the public, or located and recorded by the board of commissioners, becomes a public highway after five years use by prescription, *Town of Juliaetta v. Smith*, 12 Idaho, 288, 85 Pac. 923. *Warren County v. Mastronardi*, 76 Miss. 276, 24 S. 199, which holds that the user by the public of private land as a road in order "to ripen into title by prescription" must be "under color of right" and the privilege of passage exercised "such as to expose the party asserting such right of way to an action if he wrongfully exercised such right," affirmed, *Burnley v. Mullins*, 86 Miss. 441, 38 S. 635, *Wills v. Reid*, (Miss. 1905) 38 S. 793.

Evidence that a strip of land was platted as "reserved" and was for many years thereafter open prairie subject to the unobstructed passage of teams and pedestrians, does not establish a public way by prescription. The city by selling the land, later condemning a highway across it and taxing and levying special assessments against it, is estopped to assert title thereto, *Falter v. Packard*, 219 Ill. 356, 76 N. E. 495. Rev. St. 1887, Sec. 850 and 851, amended by Sess. Laws 1893, p. 12, were construed as not applying to a private road built and repaired by private parties with a gate across the end on their own land, and such a road did not become a public high-

way in five years time by prescription, *Palmer v. N. P. Ry. Co.*, 11 Idaho 583, 83 Pac. 947.

The records of an old town meeting contain directions to a committee to lay off land as they see fit for commons, but when the report of the committee is not in evidence it is not anything which could injure the title to land subsequently granted by the town to A., and when B. shows a complete chain of title to land accompanied by possession, adverse possession by the town for a time would not convey a prescriptive title. Although a highway had existed through land, the town could not claim title to it as the town in repairing a highway merely acted for the State and the general public and did not hold the title, *Dawson v. Town of Orange*, 78 Conn. 96, 61 Atl. 101.

Over homestead land. When a highway had been used by the public across certain lands before a homestead settler occupied the property, the settler had no right to close the highway if the board of commissioners acting under the provisions of Rev. St. U. S. s. 2477 (U. S. Comp. St. 1901, p. 1567) and Laws 1903, p. 155, c. 103 of Washington, declared the highway a public highway after the entry of the settler and without compensation to him. The previous use of the highway by the public for a period of more than seven years had operated as an acceptance by the public of such highway and any formal action of the board of commissioners was unnecessary, *Okanogan County v. Cheetham*, 37 Wash. 692, 80 Pac. 262.

Sec. 219. Laying out or construction of street. Where only one selectman signs a petition for laying out a town-way the action of that body in laying it out is void, *In re, Conant*, 102 Me. 477, 67 Atl. 564. The provisions of the City of Mobile Charter as to street improvements, construed, *Mobile v. Mobile Light & R. Co.*, 141 Ala. 442, 38 S. 127. County Commissioners are designated to fix the boundaries of highways and town-ways by Me. Laws 1907, Ch. 143, amending Rev. Stat. Ch. 23, Sec. 11. As to the power of a municipality through its charter to open, lay out, widen, or otherwise change streets and incidentally to vacate and sell to an abutting landowner a strip or part of a street, see *Patton v. City of Rome*, 124 Ga. 525, 52 S. E. 742. Gen. Stat. 1873, p. 959, does not of itself establish public roads along section lines; the county authorities must provide for the payment of damages, *Van Wanning v.*

Deeter, (Neb. 1907) 112 N. W. 902. Pol. Code, Sec. 2681, relating to the establishment of a new road, was construed to require that only two of the ten freeholders petitioning for the establishment of the road must be taxable for road improvements, *San Louis Obispo Co. v. Sirnas*, 1 Cal. App. 175, 81 Pac. 972. Evidence that city teams had collected ashes on the street and that they were numbered with the regular city numbers, although this was customarily done with private ways, was insufficient to establish an entry of possession of such street by the city within the meaning of Mass. Rev. Laws c. 48, s. 28, providing for a petition to recover damages for the taking of a highway, *Everett v. City of Fall River*, 189 Mass. 513, 75 N. E. 946. Where an owner of private property on which a street had been laid out refused to select an appraiser after due notice, as he had a right to do, but appealed to the superior court, this had no effect to delay the opening of the street until the appeal was finally determined, *State v. Jones*, 139 N. C. 613, 52 S. E. 240. A grantor gave a deed to land bounding it by the side of an unopened street which was dotted on the city plans, starting from a definite point on the side of the street, but when he owned to the middle of the street he still retained the right to obtain damages for the taking by the city when the street was subsequently opened, *Neely v. City of Philadelphia*, 212 Pa. 551, 61 Atl. 1096. The selectmen of a town posted a notice that "We therefore lay out said way as follows. . . . also another street leading easterly from the above street. Beginning at the south-westerly corner of the Morrell lot," etc. Finally the town accepted the road as laid out and the acceptance by its terms did not include the last street which connected with the first street at an angle but it was held that the acceptance included the second street when its use had been acquiesced in for a long time, *Cushing v. Webb*, (Me. 1906) 66 Atl. 719.

Sec. 220. Alteration or vacation of street—Damages for.

Abandonment of street dedicated to the public, see *post*. §220. Hurd's Illinois Rev. St. 1905, c. 121, sections 51 et seq. authorizing persons interested to offer inducements for the alteration of a highway, construed, *Commissioners of Town of Tolons v. Bear*, 224, Ill. 259, 79 N. E. 581. Mass. Rev. Laws, c. 48, as to the rights of county commissioners to alter high-

ways upon written petition, construed, *Bennett v. Town of Wellesley*, 189 Mass. 308; *Livermore v. Norfolk County*, 189 Mass. 326, 324, 75 N. E. 717, 724, 725; *Town of Wellesley v. Norfolk County Com'rs*, 189 Mass. 324, 75 N. E. 717, 724, 725.

Under Ohio Rev. St. 1906, section 1536—148 a court of common pleas may establish or vacate a street or alley, but cannot narrow one, *Dorsch v. Beaumont, Glass Co.*, 74 Ohio St. 208, 78 N. E. 215.

Vacation proceedings. Burns Indiana Ann. St. 1901, section 4229, And Rev. St. 1881, section 3247, as to proceedings to have lots, streets, and alleys vacated upon the petition of the landowners, construed, *MacGinnitie v. Silvers*, 167 Ind. 321, 78 N. E. 1013. Under the Greater New York Charter the board of estimate and apportionment has power to close streets by a proceeding instituted by itself, not by a local board, *Reis v. New York*, 188 N. Y. 58, 80 N. E. 573. Where in 1854 a township located a public road over the farm then held by the plaintiff's predecessor in title and covered with plank an old passageway used as a water course, cattle way and private road, in 1904 it could abandon the passageway and substitute therefor a reasonable water course without compensating the plaintiff for the loss of the old passageway, *Snively v. Washington Tp.* (Penn. 1907) 67 Atl. 465. Hills Ann Codes & St. §752, providing that a street could be vacated by petition to the trustees of a town or the board of county commissioners of an unincorporated town, was construed as rendering invalid a vacation of a street by a city council on petition but without the 20 days notice, *Rapp v. Stratton*, 41 Wash. 263, 83 Pac. 182. The board of commissioners had authority to close a bridge at any time, notwithstanding a contract with the owner of land on either side of the bridge, to pay a part of the expense of building the same, and agreeing to take the responsibility of the maintenance of the bridge as a public bridge, *Glenn v. Moore County Com'rs*, 139 N. C. 412, 52 S. E. 58. The vacation of a street by a municipality, with specific authority to convey the portion abandoned to the adjacent landowners, destroys all interest of the public therein, and the abutting owners are entitled to the use of the property and are possessed of every right that they or their predecessors in title held in that portion of the street that was originally taken from their property, *Marietta Chair Co. v. Henderson*.

(Ga. 1904) 49 S. E. 312. If a town legally vacated and gave to a railroad or any other person a portion of a public street, and the portion given belonged to the appellant, then a freehold would be involved, and the appeal should come directly to the Illinois Supreme Court; but, on the other hand, if the street was simply vacated for private use and the appellant is damaged by reason of cutting down the street, a freehold is not involved, *Hoffman Bros. Brewing Co. v. Town of Cicero*, 223 Ill. 155, 79 N. E. 121. See further *ante* §7.

Damages for vacation. Pa. Acts of May 16, 1891 (P. L. 75) was construed not to grant abutting owners a right to damages when a street was vacated by the borough, *Howell v. Morrisville Borough*, 212 Pa. 349, 61 Atl. 932. Neighboring owners who because of a discontinuance of a street where it crosses a railroad must go around some distance by a new street and over a bridge to cross the railroad suffer no special and peculiar damage and may recover no damages, *Hyde v. Fall River*, 189 Mass. 439, 75 N. E. 953. Under a provision of the constitution that private property shall not be taken or damaged without compensation, the vacation of a public street entitles an adjoining owner, whose land is not taken, to recover damages from the city, *Vanderburgh v. City of Minneapolis*, 98 Minn. 329, 108 N. W. 480. Plaintiff's damages due to the vacation of a street in front of his premises amount to the difference in the value of the property before and immediately after the change, irrespective of any rise or fall of values generally in the neighborhood, *Gillespie v. City of South Omaha*, (Neb. 1907) 112 N. W. 582. If a street sought to be vacated is impassable for teams and only two planks have been laid in it for pedestrians, plaintiffs who own no land fronting on the portion proposed to be vacated have no right to an injunction against the vacation or any right to damages, *Ponischil v. Hoquiam S. & D. Co.*, 41 Wash. 303, 83 Pac. 316. A municipality vacated an alley and part of a street, and granted a railroad a right of way over it, but an abutting owner had a right to damages for the land of the alleyway which was taken by the railroad as well as damages for the depreciation of the property caused by the construction of the railroad, as all land in streets or alleyways reverts to the abutting owners when vacated by the city. See *Wilson's Rev. & Ann. St.* 1903, Sec. 48, c. 12, art. 3. Full discussion see *Blackwell E. & S. W. Ry. Co. v. Gist*, 18 Okla. 516, 90 Pac. 889. Although

the municipality vacates a street, a business concern, which does not abut on the portion vacated and whose customers from a certain portion of the city are obliged to go a block further, is not sufficiently inconvenienced to obtain damages, and the courts have no right to review the exercise of the right to vacate streets in the absence of collusion or fraud, as it is a legislative function granted by Washington Laws of 1901, c. 84, p. 175, *Mottman v. City of Olympia*, (Wash. 1907) 88 Pac. 579.

Rights in vacated street. Where the defendant, a city, obtained title through a common grantor with the plaintiff, the latter having purchased with reference to a map upon which the property appeared to abut upon a certain street, so long as the street remains open in front of the plaintiff's property and opens into cross streets at both ends, the city may erect a building upon a part of the street which they have closed if such building does not obstruct the plaintiff's property as far as light and air are concerned, *Reis v. New York*, 188 N. Y. 58, 80 N. E. 573. When the legislature has relinquished its right to a street, an owner whose only frontage is on the street may have it kept open as he is entitled to a reasonable means of ingress and egress to his property, when he purchased with the streets accepted and plotted, *Highbarger v. Milford*, 71 Kan. 331, 80 Pac. 633.

Estoppel of city. Although mere adverse possession for 20 years of an alley does not divest public rights, a city may be estopped from opening one where they have allowed persons in good faith to erect permanent buildings therein, *El Paso v. Hoagland*, 224 Ill. 263, 79 N. E. 658. Although borough officials gave a railroad permission to enclose a street by a fence, there can be no estoppel against the borough when the public afterward desire to use the street as the officials had no authority to vacate the street, and mere abandonment for a few years could not forfeit the rights of the public or prevent the opening of the street by a subsequent administration, *Central R. Co. v. Seabright*, (N. J. Law Frr. and App., 1906) 64 Atl. 131.

Sec. 221. Obstruction in street.

Obstruction of highway as a nuisance, see *post* §221.

Mass. Rev. Laws, c. 11, s. 186, does not confer upon the election commissioners the right to locate a polling booth

in the traveled part of a public street, *Haberlil v. Boston*, 190 Mass. 358, 76 N. E. 907.

An individual cannot enjoin the obstruction of a public street unless some special damage to his property or injury to him, differing not only in degree, but in kind, from the damage sustained by the community at large, is threatened, *Robbins v. White*, (Fla. 1907), 42 S. 841. Injunction against fences maintained by abutting owners across section lines declared by statute to be public highways was issued in *Lawrence v. Ewert*, (S. D. 1908) 114 N. W. 709. Property holders along a street may join in one suit to prevent its obstruction, *Gill v. Lake Charles*, 119 Fla. 17, 43 S. 897. The heirs of the owner of a burial lot in a cemetery adjoining a public street, members of the family being buried therein, may maintain a bill to remove obstructions in the street, *Weiss v. Taylor*, 144 Ala. 440, 39 S. 519.

The defendant's grantor erected brick kilns on a street as laid out in a plan, knowing he was encroaching on a public or private easement in the year 1897, but when the adjoining property owners were silent, making no protest, they were not guilty of laches by 1906, and if the plans were recorded and referred to in the chain of title of the property purchased by the defendant, there was no estoppel in equity against the right of the adjoining property owners to compel the removal of the brick kiln in the streets, *Garvey v. Harbison-Walker R. Co.*, 213 Pa. 177, 62 Atl. 778.

Sec. 222. Rights of abuttor against flooding from street.

A dancing master who notified the city in an open meeting of the common council that a storm sewer in front of his property was defective, had a right to recover damages when a big storm damaged his building so he was unable to hold his classes, and he could recover for his consequent loss in receipts, *Kramer v. C. of Los Angeles*, 147 Cal. 668, 82 Pac. 334.

Sec. 223. Height of buildings abutting on street. Mass.

St. 1902, p. 471, c. 543, section 1, relating to the improvement of the statehouse and grounds, and section 2, which limits the height of buildings in certain parts of Boston, construed, *American Unitarian Ass'n v. Commonwealth*, (Mass. 1907) 79 N. E. 878. Mass. St. 1904, p. 283, c. 333, and St. 1905, p. 309, c. 383, limiting the heights of buildings in Boston, dividing the

city in two parts in each of which there is a prescribed height, and giving to commissioners power to make rules and regulations relating to height as subsidiary legislation, are constitutional. A regulation by the commissioners forbidding the erection of a building in the residence district higher than 80 feet, unless its width on each street on which it stands will be at least one-half its height, is a proper regulation, *Welch v. Swasey*, (Mass. 1907) 79 N. E. 745.

Sec. 224. Damages from construction of railroad in street—On embankment or in excavation. Where a railroad condemns the whole of a dedicated but unimproved street, the abutting owner is entitled to full compensation for land taken, *Suffolk & C. Ry. Co. v. West End Land & Improvement Co.*, 137 N. C. 330, 49 S. E. 350. "A street surface passenger railway constructed at street grade in the usual manner and operated by animal power (or by electricity) is not per se a public or private nuisance, nor is it a new servitude imposed upon the land for which the owners of the fee are entitled to compensation." Booth on street railways, section 82, quoted with approval, *Morris v. Montgomery Traction Co.*, 143 Ala. 246, 38 S. 834. An ordinance of the council of the City of Cincinnati setting forth the terms upon which a certain railroad may occupy certain city streets, is void, because such a grant would be inconsistent with, and a diversion from, the use for which the land was originally dedicated, *Louisville & N. R. Co. v. Cincinnati*, 76 Ohio 481, 81 N. E. 983. Taxpayers in Louisiana may join in one suit to prevent the illegal disposition of the property of the city, or to contest the city's right to grant to a railroad a right of way along what is claimed not to be a street but private property belonging to each of them respectively, *Gill v. Lake Charles*, 119 La. 17, 43 S. 897. Where a railroad located its right of way in a street to the centre of which an abutter owned the fee he could recover as damages the value of the land covered by the location, subject to the easement of a public road, and damages to the remainder of the tract. In this latter he could not include damages to tide-flowed land adjoining his upland on the street since the title to that was in the state but its damage might be considered in estimating the value of the upland itself. Special benefits, caused by the location of the railroad may be deducted from the damages recoverable—for the land not actually taken.

Various questions as to the admissibility of testimony as to these damages were decided, *Taber v. N. Y. P. & B. R. Co.*, (R. I. 1907), 67 Atl. 9.

On embankment. Under the constitutional provision that private property shall not be taken or damaged for public use without compensation a railroad company which has acquired its right of way prior to plaintiff's purchase of his land is liable to him for damages due to the construction on its right of way of an embankment cutting off his light and air during his ownership, *Little Rock & Ft. S. Ry. Co. v. Greer*, (Ark. 1906) 96 S. W. 129. An allegation in an action for damages against a railroad that the defendant placed an embankment four feet high in front of and parallel with the front of the plaintiff's lots shows apparent injury without benefit. As the land abutted upon the highway an allegation that the plaintiff was entitled to ingress and egress thereon was unnecessary, *Yates v. Ry. Co.* (Ky. 1905) 89 S. W. 108. The allegation that a railroad has under a privilege granted by the city authorities constructed an embankment upon a street on which the plaintiff abuts is insufficient to show a substantial cause of action. The nature of the actual damages should specifically appear, *Birmingham Ry. & C. Co. v. Oden*, 146 Ala. 495, 41 S. 129. Under Mass. Rev. Laws, c. 111, s. 153, as to damages upon the abolition of grade crossings one whose land is not taken but in front of whose house at a distance of only 40 feet, a street nearly 15 feet high, over which teams are frequently passing, is built, may recover damages therefor, *Hyde v. Fall River*, 189 Mass. 439 75 N. E. 953. Under N. Y. Laws 1901, p. 1787, c. 729, permitting the presentation to and allowance by the Court of Claims for damages due to the Park Ave. (N. Y. City) embankment, no evidence is admissible before that court showing a decrease in the value of the property after the railroad companies began running trains thereon, *Sander v. State*, 182 N. Y. 400, 75 N. E. 234.

In excavation. Under Cons. Art. 1, Sec. 21, an abutting owner, having no property right in a street, may recover damages from a railroad company which is allowed, by ordinance, to construct its tracks in an excavation in the street, *Stehr v. Mason City & F. D. Ry. Co.*, (Neb. 1906) 110 N. W. 701.

Sec. 225. Damages from operation of railroad in street.
An abutter may recover damages for special injury caused by

the improper operation by an interurban railroad of its cars up to the bringing of the action, although she conveys the property pending the action, *Kinsey v. Union Traction Co.*, (Ind. 1907) 81 N. E. 922. In an action for an injunction against a railroad's building a switch near the county road on account of the consequent depreciation in value of the plaintiff's property and the inconvenience and danger resulting in the use of the county road by the plaintiff which is the only means of access to her property, the plaintiff is not entitled to an injunction either on account of the depreciation in value of her property as there is not evidence to show what the depreciation will be, or on account of the increased difficulty or danger in using the county road as that is not peculiar to the plaintiff but will be suffered by the public generally, *Davis v. Baltimore & Ohio R. Co.*, 102 Md. 371, 62 Atl. 572.

Location of tracks. When an owner gave a street railway company permission to locate in front of his lot and construct the necessary turnouts, his trustees could not after 13 years had elapsed, compel the railroad to remove a switch although the city had obtained a decree ordering such removal 8 years previously, the enforcement of which was waived, *Taylor v. Erie City P. R. Co.*, 212 Pa. 487, 61 Atl. 992. In an action for damages to an abutter's property caused by the construction and operation of a switch track in front of it evidence that the property is thereby increased in value for warehouse purposes is not admissible when the property is not being used for that purpose, *Romano v. Yazoo R. Co.*, 42 Miss. 721, 40 S. 150. Although the plaintiff was slightly damaged by having car tracks built close to the sidewalk of one portion of his lot, so that the cars overhung two inches of the sidewalk at the corner, it was not a damage for which he could obtain redress, *Hester v. Durham Traction Co.*, 138 N. C. 288, 50 S. E. 711. A verdict of \$117.50 damages in favor of an abutter against a street railway was not excessive where it appeared that the railroad located its track on the side of the abutter's carriage way so that the tires came very close to the line of the sidewalk, leaving no room for a gutter or a passage way for vehicles between the track and the sidewalk, *Camden Interstate Ry. Co. v. Stein*, (Ky. 1906) 97 S. W. 394.

Character of trains. Interurban roads. Although abutters cannot recover damages caused by the operation of an ordinary street railroad they can where a railroad connects two cities 60

miles apart, use cars 60 feet long, carrying both freight and passengers, and does a "through" business in competition with the steam railroads. The case contains a valuable discussion of the authorities, *Kinsey v. Union Traction Co.*, (Ind. 1907) 81 N. E. 922. A railroad which carries not only passengers with ordinary hand baggage, but practically freight of all kinds from one point to another on the street and from town to town along the entire line of the road is a commercial, not a street railway. Where it, therefore, constructs its track on the street without the consent of the owner of the fee or condemnation proceedings equity will compel its removal by a mandatory injunction. A delay from December, 1903, the date of the construction of the track, to August, 1905, the date of the commencement of the suit does not of itself constitute laches, *Spalding v. Macomb & C. Ry. Co.*, 225 Ill. 585, 80 N. E. 327. A railroad organized under the general railroad law, not the street railroad statute, to operate in several counties and licensed by a municipality "to transport passengers and their ordinary baggage, United States mail, express, and milk," and to connect with an interurban railroad, is a "commercial" not a "street" railroad and may not lay its tracks in a street, the fee of which is in the abutters without condemnation proceedings, *Wilder v. Aurora, De K. & R. Electric Traction Co.*, 216 Ill. 493, 75 N. E. 194.

When a street railroad was authorized to do a freight business prior to the date of the plaintiff's purchase of abutting land the plaintiff can recover no damages due merely to an increase in this business. The right of action for damages by reason of the construction of a railroad accrues to the owner at the time of the construction and does not pass by his subsequent conveyance of the land damaged, *Birmingham Belt R. Co. v. Lockwood*, (Ala. 1907) 43 S. 819. Where the railroad takes a part of the highway by eminent domain the measure of damage is the perpetual interest taken. An interurban electric railway having the power from the state by eminent domain took a location through a street in which it already had a street railway franchise for 50 years from the city. Upon a petition by an abutting owner for assessment of damages, the trial judge instructed the jury that the measure of damages was the damage sustained by reason of the defendant operating interurban cars in addition to ordinary street railway cars. Held that he should have allowed the jury to assess the

damage occasioned by the taking of a right of way which was a perpetual interest in the land of the plaintiff, *Marsh v. Milwaukee Light, Heat & Traction Co.*, (Wis. 1908) 114 N. W. 804. Under Rev. St. 1898, Sec. 1862 and 1863a, the construction of an interurban street railroad in a street imposes upon the land of the abutting owners servitudes not contemplated in the original taking of the land for highway purposes and gives them rights of action against the company, *Abbott v. Milwaukee Co.*, 126 Wis. 634, 106 N. W. 523.

Railroad in Park. If a land owner brings suit because a railroad operated in a public park in front of his house has marred the artistic beauty of the park, he has no right to an injunction unless he proves special damages to his own property causing its depreciation in value, as he has no right to damages for the destruction of the artistic beauty of the park as that loss is suffered in common with the general public, *Bayard v. Bancroft*, (Del. 1905) 62 Atl. 6.

Sec. 226. Elevated railway in street.

Elevation not a vacation of streets. Where a city has granted a railroad company permission to use its streets for its tracks but the city has grown so large as to make such uses dangerous the city may by ordinance require the elevation of the tracks. Such elevation does not constitute a vacation of the streets and cause a reverter in fee to the abutters, *Weage v. Chicago R. Co.*, 227 Ill. 421, 81 N. E. 424.

Prescription. Where in an action by an abutter against an elevated railroad for damages caused to his easement of light and air by the erection and maintenance of the structure the railroad company relied upon a prescriptive right based upon 20 years adverse possession, evidence of settlements made with other owners on the same street and of the filing of a petition by the vice president of the company with the tax commissioners asking for an abatement which stated that there were many claims of abutters still unpaid for, was inadmissible. It was held that by the construction of the railroad and its operation for over 20 years the prescriptive right claimed was acquired, *Hindley v. Manhattan Ry. Co.*, 185 N. Y. 335, 78 N. E. 276.

Evidence of damages from an elevated railway was considered in *Pierson v. Boston Elev. Ry. Co.*, 191 Mass. 223, 77 N. E. 769. Where upon the second trial of an action to en-

join the operation of an elevated railroad unless an abutter be compensated, a company to which the road has been leased since the first trial is made a party, the testimony given in such first trial by a witness who has since died is admissible as against such new party. Error in admitting evidence as to the rental value of an entire hotel property, part of which only abutted upon a street on which an elevated railroad had been built, was cured by cross examination showing the value of each part. An expert may testify that the same course of values would have prevailed in the locality as did in other parts of the same street but for the road, *Shaw v. N. Y. Elevated R. Co.*, (N. Y. 1907) 79 N. E. 984. In proceedings to condemn land to widen an elevated railway for a third track in which the petitioner showed that it intended to move a station from its location adjoining property of the defendant not sought to be condemned and run express trains on the third track at 40 miles an hour evidence of damages to that property on that account was immaterial because the petitioner had a right to remove the station and run the trains at 40 miles per hour upon its existing tracks. Testimony that the tenant of land taken conducted a dance hall in violation of law was immaterial. The phrase "highest and best use" as used in connection with the value of land means not morally but financially. If the premises were worth more as a dance hall and saloon the owner was entitled to compensation for their depreciation for this particular use, *Freiberg v. South Side Elevated R. Co.*, 221 Ill. 508, 77 N. E. 920. Effect of elevated railway on patrons of restaurant, see *ante*, §160.

Conditional consent to. Where an abutting owner wrote upon a paper circulated to obtain consent to the construction of an elevated road, "I am in favor of an elevated road over the middle of the street, but not on the walk" he thereby made only a conditional consent which was not accepted because the road was built on to the sidewalks, *Shaw v. N. Y. Elevated R. Co.*, 187 N. Y. 186, 79 N. E. 984.

Sec. 227. Pipes and tunnel in street. A pipe line conveying natural gas laid in a public highway, although imposing an additional service on the road is not an additional burden on an abutting estate in fee, and when the pipe line is for a public use the proper authorities controlling the streets and

roads may grant a valid right to convey gas by a pipe. *Hardman v. Cabot*, 60 W. Va. 664, 55 S. E. 756. The laying of gas mains of a private corporation in a country road, where the abutters owned the fee, constituted an additional servitude and could not be done without the consent of such owners, *Paine's Guardian v. Color Oil & Gas Co.*, 31 Ky. Law Rep., 754, 103 S. W. 309.

The building of a tunnel caused the settling and a partial collapse of certain buildings and damages to the tenants. Dynamite blasts in the tunnel caused the buildings to rock and crack, although the tunnel was 120 feet away. A subterranean stream, containing mud and the soil from the plaintiff's land was tapped and pumped out which caused a settling of the ground and buildings. The defendant was liable for damages, but he was not liable for damages to the plaintiff owing to a possibility of the plaintiff's tenants suing the plaintiff for damages, as they had no right to sue for injuries caused by the defendants without the plaintiff's negligence, *Farnandis v. Gt. Northern Ry. Co.*, 41 Wash. 486, 84 Pac. 18.

Sec. 228. Poles and wires in street. A telephone and telegraph line upon a rural highway constitutes an additional servitude upon the fee of the abutting owners, *Cosgriff v. Tri-State T. & T. Co.*, (N. D. 1906) 107 N. W. 525. The lines and poles of a telephone system upon a city street constitute an additional servitude where the fee is in the owner of the abutting property but such an owner cannot have an injunction against the erection of poles except where she actually owns the fee. She cannot prevent the use of the entire street. In previous decisions this court had held that in a country street under similar conditions such poles constituted an additional servitude, *DeKalb Co. Tel. Co. v. Dutton*, 228 Ill. 178, 81 N. E. 838. Telephone poles and wires erected in the street do not place thereon an additional servitude for which the abutters who own the fee can recover compensation, *Frazier v. Telephone Co.*, 115 Tenn. 416, 90 S. W. 620.

Sec. 229. Trees in streets and highways.

As to trees, see further *post* §§573-576.

An abutter may plant shade and ornamental trees in a city street subject to the right of the city alone to trim or remove them when they interfere with a proper use of the street,

Cartwright v. Liberty Telephone Co., 205 Mo. 126, 103 S. W. 982. The owner of land abutting on the highway cannot sue a road commissioner for damages caused by trimming and cutting a hedge planted on the highway by the municipal authorities, *Bright v. Bell*, 117 La. 947, 42 S. 436. Various sections of the Mass. Revised Laws as to the powers of towns and cities over shade trees, construed, and it was held that by virtue thereof a town may reimburse a tree warden and his deputy for the expenses incurred by them in the unsuccessful defense of a suit brought against them by the town, because they undertook to prevent the use of certain trees to support guide posts, *Huxon v. Inhabitants of Sharon*, 190 Mass. 347, 76 N. E. 909.

When no notice was given an abutting owner and a tree was cut in front of plaintiff's house by an electric light company arbitrarily and without due regard to the owner's rights, punitive and exemplary damages may be assessed. This is especially true when the evidence did not show that the cutting of the tree was absolutely necessary but only that it rendered it easier to string the wires. The fact that the city council granted authority to the company to erect the poles and subsequently ratified its action in cutting down this tree, still left it incumbent on the company to pay damages, *Brown v. Asheville Electric Light Co.*, 138 N. C. 533, 51 S. E. 62.

Sec. 230. Change of grade—Municipal liability—Statutes construed.

When liable. Lessees may recover for damages to property abutting upon a street caused by a change in grade under Mass. Rev. Laws c. 48 ss. 17 *et seq.* even although the owner of the freehold has suffered no damages, *Galeano v. Boston*, 195 Mass. 64, 80 N. E. 579. Under the constitutional provision for compensation where private property is "damaged" for a public use owners are entitled to relief on the first grading of a street, *Sallden v. City of Little Falls*, (Minn. 1907) 113 N. W. 884. The building of approaches to a bridge in such manner as to cut off access to premises by driving and to make a flight of steps for those on foot necessary and to cut off drainage from them amounts to a taking of property by the city constructing the bridge, *Ramon v. City of Sault Ste. Marie*, 143 Mich. 661, 107 N. W. 439. The provisions of Const. art 1, § 6 and art. 4, § 58 [Va. Code 1904, pp. ccix,

ccxxii] repeal existing laws inconsistent therewith, and give to one whose costly building has been damaged for public use, by reason of a change of grade of the street upon which it stands the right to maintain an action for just compensation, *Swift & Co. v. City of Newport News*, 105 Va. 108, 52 S. E. 821.

When not liable. As incidents to the ownership of a lot bordering on a public street, there are, in addition to the right of passage over the street in common with the public, the private property right of egress and ingress from and to the lot by way of the street and the right of light and air which the street affords. The owner holds subject to the right of the state, or any duly authorized governmental agency acting for it, to improve the street for public use by altering the grade of the street, by the erection of a viaduct thereon, or otherwise, for street purposes; and the owner has no right of action against a city so authorized because of changes made by it in the grade by building or rebuilding a viaduct thereon, when there is no physical invasion of or trespass upon the lot, and no malice, negligence, or unskilfulness in the use or improvement of the street for street purposes, *Bowden v. Jacksonville*, (Fla. 1906) 42 S. 394. A street railway company which changes the grade of a street in accordance with locations granted by municipal officers is not liable for damages to an abutting owner. The case contains a very valuable discussion of the Massachusetts statutes on the subject, *Hyde v. Boston & W. St. Ry. Co.*, 194 Mass. 80, 80 N. E. 517. Under Sec. 18 of the Bill of Rights declaring that private property shall not be taken for a public use without compensation a city is not liable to the owner of property abutting on a street for diminution in sale and rental value and expense of building a retaining wall in consequence of a lowering of the grade of the street, the fee of which is in the city, *Talcott Bros. v. City of Des Moines*, (Ia. 1906) 109 N. W. 311.

Damages and evidence. In an action against a city for injuries to abutting property due to change of grade under Kentucky Civ. Code Prac. section 318 with regard to allowing the jury to take a view of real property the court may order a view to be taken at the request of a juror, although neither of the parties so requests, *Louisville v. Caron*, (Ky. 1906) 90 S. W. 604. In an action for damages to an abutting owner caused by the change of a grade in a street the plain-

tiff may recover the difference in the market value of the property before and after the change, taking into consideration its locality, adaptability, the uses to which it was put, the effect of the change upon its assessibility, excluding benefits to the plaintiff in common with the general public, *Warren County v. Rand*, 88 Miss. 395, 40 S. 481. When a street had been used for travel for many years and the city had recognized the grade, an abutting owner had a right to sue for damages to his property when the grade was changed so the trees on the property were killed and its appearance injured so it was impossible to find a tenant. The measure of damages was the difference between the market value before and after the change of grade by the city, *Hempstead v. Salt Lake City*, (Utah 1907) 90 Pac. 397. Where a plaintiff sues for damages for injury to her house and lot occasioned by filling the street in front of it, to the extent of about four feet, but leaving the property capable of certain uses and with a certain value in its present condition, it is wrong to include all of the estimated cost of making changes in the property in conformity with the change of grade, which should be subordinated to the difference in the market value of the property occasioned by the improvement, deducting therefrom the special benefits accruing to the property from the improvement; allowances for alterations only being made when the alterations are necessary to the preservation of the property or the enjoyment thereof. Cases fully cited, *Godbey v. City of Bluefield*, 61 W. Va. 604, 57 S. E. 45. When the plaintiff in an action for damages caused by grading an abutting sidewalk testified in his direct examination that his property was worth \$3,500 before the grading it was proper in cross examination to ask him whether a week before the work was done he had offered to sell for \$3,000. He could also be asked the rental value before and after the construction of the sidewalk. Such questions test the correctness of the witness' estimate as to value, and also tend to show the jury whether or not the property had deteriorated in value. But questions based on the proposition that the sidewalk was improved are improper because the use of the improved sidewalk was one of the general benefits enjoyed by the plaintiff in connection with the general public, and cannot be taken into consideration in determining whether the property was improved or deteriorated, *Town of Eutaw v. Botwick*, (Ala. 1907) 43 S. 739.

Effect of ancient release. Although a railroad company took a conveyance of a strip of land 100 feet wide through a farm with a release from the owner of the farm "from all damages and inconvenience incident to the construction and use of the railroad," the release did not operate to relieve the company 40 years later from damage to the land of a grantee of the owner when the grade of the street was raised during the raising of a bridge, *Perrine v. Pennsylvania R. Co.*, 71 N. J. Law 644, 61 Atl. 87.

Statutes imposing liability. Mass. Pub. St. 1882, c. 52, ss. 15 *et seq.* authorizing the recovery of damages to abutters due to a change in the grade of the street, which gave a remedy not before existing at the common law, construed, *Partridge v. Arlington*, (Mass. 1907) 79 N. E. 812. Mass. Rev. Laws, c. 112, section 44, making street railways liable for injury during construction due to the carelessness of its servants, does not give an abutter who owns the fee an action for damages caused by the slight raising of the grade of the street by an embankment built by a street railroad, *Laroe v. Northampton St. Ry. Co.*, 189 Mass. 254, 75 N. E. 255. Rev. St. 1898, s. 282 was construed to render a city liable for a change in the grade of a street when a "paper grade" was given a builder who erected houses according to that grade, and subsequently the street was graded at a different grade when the actual construction work was begun, *Kimball v. Salt Lake City*, (Utah 1907) 90 Pac. 395. In an action under Shannon's Code, 1988 against a city for damages caused by a change in grade evidence of the cost of a rock wall necessary as a result of the grading, the possible impairment of the right of ingress and egress, the freedom from dirt and dust from the street, and the rental value, was admissible but no recovery could be had for inconvenience during the progress of the work, *Acker v. Mayor and Aldermen of Knoxville*, (Tenn. 1906) 96 S. W. 973.

In an action against a city by an abutter for damages due to a change in grade the cost of the grading is not included in the special benefit accruing to such abutter which must be deducted from the damages in an action under Missouri Constitution of 1875, section 21, article 2, *Widman Inv. Co. v. St. Joseph*, 191 Mo. 459, 90 S. W. 763.

Constitutionality of statute. The fact that the Tennessee Statute of 1901 imposing a liability on municipalities for dam-

ages to abutting owners due to a change in grade exempts from its operation certain cities makes it to that extent unconstitutional, *Coyne v. Memphis*, (Tenn. 1907) 102 S. W. 355.

Sec. 231. Defective highway — Municipal liability.

Where one sustained injuries from the defective condition of a board in a boardwalk on a city street damages were awarded, *Campbell v. City of Elkins*, 58 W. Va. 308, 52 S. E. 220. A city's duty is to keep its sidewalks in a reasonably safe condition at all times for public use and to use ordinary care and diligence to repair them when defective and to discover and remove dangerous conditions, *Crandall v. City of Dubuque*, (Ia. 1907) 112 N. W. 555. Where the city built a road along the brink of a deep lake so the plaintiff's husband was drowned through the negligence of the city in not having a proper fence beside the lake, the city was liable for damages, *City C. of Augusta v. Dozier*, 126 Ga. 524, 55 S. E. 234. If the plaintiff was passing along a slippery sidewalk without paying any particular attention to its condition and was injured while exercising due care the municipality was liable for damages, *Clark v. Borough of Torrington*, (Conn. 1906) 63 Atl. 657.

When a city assumed and exercised control over a man-hole and its cross-pipe, and dealt with it as a part of its drainage system, the city is liable for any damage occasioned by such wrongful construction of the cross-pipe and the man-hole, if it has been duly notified and fails to correct the situation. It is immaterial who built them originally, *Fewell v. City of Meridian*, (Miss. 1907) 43 S. 438. Where the plaintiff's view of the sidewalk was obstructed by a crowd, and she fell into a hole in the sidewalk in the daytime immediately after passing through the crowd before she had time to see the hole, the city was liable for damages as the defect had existed for several months, *Becker v. City of Philadelphia*, 212 Pa. 379, 61 Atl. 942. Where the plaintiff was injured while approaching a bridge by stumbling on a loose rock and falling over the steep side of the embankment which had no guard rail, the county was liable for damages as the approach to the bridge had been used for twenty years and had been repaired from time to time by the county, *Garrett C. C. v. Blackburn*, (Md. 1907) 66 Atl. 31. The board of public works of San Francisco are liable for injuries resulting from their negligence in consequence of defects in the sidewalks. When the board notified a property

owner to repair the sidewalk in front of his property by constructing an artificial stone sidewalk, they did not escape liability for an injury to the plaintiff if the board did not proceed with due diligence and compel the owner to repair the sidewalk or let the contract for the work itself when the cost would become a lien against the property. The fact that the board had no money in the treasury was no defense and the board was liable for damages for negligence as well as the sureties on their bonds, *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331. A city charter provided that the duty of keeping the sidewalks in proper condition was imposed upon the owners of the adjacent lots and that in case of injury by reason of the negligence of any other person the latter should be primarily liable, and the city only after all remedies had been exhausted. In an action against the city by one who had been injured by a defective sidewalk and who had made no attempt to collect from the owner it was *held* that this provision in defendant's charter was not affected by the general charter provisions of Sec. 925 Laws 1898, and that defendant's demurrer should be sustained, *Hay v. City of Baraboo*, 127 Wis. 1, 105 N. W. 654. In the construction of a railing over a city viaduct there is no liability for injuries due to alleged defects if experts having all the knowledge and skill that experience in such work would naturally give them are employed, *Watters v. City of Omaha*, (Neb. 1906) 107 N. W. 1007.

City's knowledge of defect. A street commissioner is a proper person to receive notice of defects in highways, *Weitzel v. Village of Fowler*, 143 Mich. 700, 107 N. W. 451. Mass. Rev. Laws, c. 51, s. 18, which imposes upon a town the duty of using reasonable diligence to remedy defects due to a failure to make proper repairs in public ways, construed, Knowledge of the superintendent of streets of the defect is sufficient notice thereof to the town, *Mason v. Winthrop*, 196 Mass. 18, 81 N. E. 644. Evidence that a plank sidewalk in the immediate vicinity of a defective plank alleged to have been the cause of an accident was in bad condition two or three years before and that the plank in question had been rotted off for some months is sufficient to show notice to the city, *Epelett v. City of Sault Ste. Marie*, 144 Mich. 392, 108 N. W. 360. In a case of injuries to one crossing a defective culvert it was held that in order to establish negligent breach of duty, it must be shown that the defect might have been dis-

covered by ordinary diligence and that injuries to travelers therefrom might reasonably be anticipated, *Fitzgerald v. City of Concord*, 140 N. C. 110, 52 S. E. 309. When the city ordinances and the recorded street map show that a street has been dedicated and accepted the municipality is liable for the drowning of a child in a hole on the street when it had been repeatedly notified of the existence of the defect, although the sidewalks were not built, *City of Newport News v. Scotts Adm'x*, 103 Va. 794, 50 S. E. 266. To show that the dangerous condition of a plank sidewalk was reasonably observable by the officers and agents of the defendant city it was held competent for the plaintiff to prove that the boards were obviously decayed and loose by reason of such condition, *Clark v. City of Cedar Rapids*, 129 Ia. 358, 105 N. W. 651. When the sidewalks of a city remained very slippery for two or three weeks with ice before the plaintiff was injured by falling on the slippery sidewalk and the city made no effort to render it safe, the plaintiff was entitled to recover damages, *Bull v. City of Spokane*, (Wash. 1907) 89 Pac. 555. If a defect has existed in a sidewalk for such a length of time that the municipal authorities would have discovered it by the exercise of ordinary diligence, then notice is presumed, and the municipality is liable for damages caused by its negligence, *Idlett v. City of Atlanta*, 123 Ga. 821, 51 S. E. 709.

Notice of injury. Under Sec. 2775 Comp. Laws 1897 a notice that the plaintiff "sustained personal injuries" with an affidavit that "she had suffered continually since the injury" does not set forth sufficiently the "extent" of the injury as required, *Miller v. Village of Birmingham*, 145 Mich. 470, 108 N. W. 1015. Sec. 36, c. 13a, Art. 1, Comp. St. 1897, requiring certain formal notices to be given to the city in case of claims due to defective sidewalks, construed, *Nothdurft v. City of Lincoln*, (Neb. 1905) 105 N. W. 1084. The Middletown city charter which provides no action shall be maintained for injuries to a person caused by snow or ice on the street unless a certain written notice was given, construed and held constitutional, *MacMullen v. Middletown*, (N. Y. 1907) 79 N. E. 863.

Contributory negligence. If a traveler is injured on a sidewalk the city, to avoid liability, must show that he knew of the particular danger and also that it was imprudent to attempt to use the defective way, *Cook v. Incorporated Town*

of Hedrick, (Ia. 1907) 112 N. W. 157. When a sidewalk is in a slippery and dangerous condition from ice, a man is negligent who walks over it at a rapid gait and he cannot recover from the city for injuries due to slipping and falling, *City of Charlottesville v. Failes*, 103 Va. 53, 48 S. E. 511. Whether one, who stepped on to a bridge, while looking at one side at a workman cutting a tree, thereby causing injury to herself by stumbling over a loose plank, is negligent and the act was the proximate cause of the injury is a question for the jury under proper instructions, *Brewster v. Elizabeth City*, 137 N. C. 392, 49 S. E. 885. When one using a sidewalk knows it is dangerous to walk on and is subsequently injured, his knowledge of the condition of the sidewalk may be shown to support a finding of contributory negligence depending on the degree of danger in walking over the sidewalk, *Shannon v. Tacoma*, 41 Wash. 220, 83 Pac. 186.

Negligence of child. Where a municipal corporation was negligent in leaving a deep ditch or excavation across a sidewalk without a fence or other protection, and a child exercising such care as its capacity, mental and physical fits it for, falls therein, [Civ. Code 1895, §2901] the municipality is liable, *Herrington v. Mayor, etc., of City of Macon*, 125 Ga. 58, 54 S. E. 71. When the plaintiff is injured by a defect in the sidewalk consisting of two stop boxes or water plugs projecting a few inches above an ordinary brick sidewalk, the municipality is liable for damages, and a child 5 years old could not be charged with contributory negligence as he naturally would not exercise as much care as an adult, *Parrish v. City of Huntington*, 57 W. Va. 286, 50 S. E. 416.

Officers' liability. The Vrooman Act (St. 1885, pp. 160, 161, c. 153, §§22, 23), rendering the superintendent of streets liable for injuries to persons in consequence of defects in the streets when he has been notified of such defects for more than 24 hours, was construed, *Merritt v. McFarland*, (Cal. 1906) 88 Pac. 369.

Proximate cause. When a hole was left in a bridge so a horse caught his foot while passing over it and the plaintiff was severely injured by his horse falling on him when he went to its assistance, the county was liable as the failure of the county to keep the bridge in proper repair was the proximate cause of the injury, *Cooper v. Richland County*, 76 S. C. 202, 56 S. E. 958.

Damages. The plaintiff was injured in consequence of stepping upon a loose board in a sidewalk which flew up and hit him, and his injuries were aggravated by a disease, but he was able to recover full damages when the defect in the sidewalk would not be easily noticed by passers by, *City of Roswell v. Davenport*, (N. M. 1907) 89 Pac. 256.

Sec. 232. Defective highway—Owner's liability—Ice and snow. Where a telephone company dug a ditch in a street in such a manner that it was peculiarly liable to cave in, because it was twice as wide at the bottom as at the top, the company was liable for damages by a cave in when the plaintiff was injured while jumping over it, *Kent v. Southern Bell Telephone & Telegraph Co.*, 120 Ga. 980, 48 S. E. 399. When a pedestrian was injured by falling through trap doors in a sidewalk, which were unsafe, the city was entitled to recover against the owner of the property when the pedestrian had recovered damages from the city, *City of Seattle v. Puget S. Imp. Co.*, (Wash. 1907) 91 Pac. 255.

Landlord not liable. When the plaintiff was injured on account of a brick being removed from the sidewalk, the landlord of the abutting property who was not shown to have had notice of the defect, was not liable for damages when he had rented it to a tenant without binding himself to keep the premises in good repair, *Lindstrom v. Pa. Co. for Insurance on L. & G. A.*, 212 Pa. 391, 61 Atl. 940.

Bridges. No recovery can be had against the City of New York for damages caused by the dropping of splinters and snow and water from Brooklyn Bridge onto the roof of the plaintiff's building when it is situated about 20 feet from the entrance to the bridge, *Sadlier v. New York*, 185 N. Y. 408, 78 N. E. 222. In an action for damages for injury to a plaintiff and her horse, caused by the horse stumbling through a hole in a bridge, attached to and part of the S. Railway Bridge, it was found that there was a contract between the predecessors of the S. Railway and the owner of the ferry which had descended to it, to keep this bridge in repair. Notwithstanding the fact that the county authorities did from time to time put repairs on this bridge the defendant company was not relieved from the responsibility to repair the bridge and was liable for injuries caused by such negligence, *Wertz v. Southern Ry. Co.* 76 S. C. 388, 57 S. E. 194.

Ice and snow. The owner of a house abutting on a private way which other abutters had a right to use in common owed a duty to a person lawfully thereon not to discharge water from gutters on his roof in such a way as to cause an accumulation of ice on the sidewalk, *Cavanagh v. Block*, 192 Mass. 63 (77 N. E. 1027.) An abutting owner owes no duty to travelers to keep the sidewalk clear of ice and snow coming thereon from natural causes, or to guard against the risk of accident by scattering ashes or using any other like precautions, whether or not any public duty was imposed upon him by the ordinances of the City, *Dahlin v. Walsh*, 192 Mass. 163, 77 N. E. 830. The maintenance of a structure in such a way as to discharge artificially collected water upon an abutting sidewalk, causing ice to form thereon, is a nuisance the right to maintain which cannot be gained by prescription. It is immaterial that some of the ice may have formed from water coming from other sources beyond the owner's control, *Hynes v. Brewer*, 194 Mass. 435, 80 N. E. 503. Where the evidence does not show that the injuries to the plaintiff were caused by slipping on ice that had been formed from water artificially conducted upon the sidewalk by draining the water from the roof, but that the ice was formed from melting snow or surface water, the plaintiff is not entitled to recover for damages, *Greenlaw v. Milliken*, 100 Me. 440, 62 Atl. 145. A borough allowed irregular and rough places in the pavement or the sidewalk to become filled with snow and ice so as to render it unsafe and the borough permitted this condition to exist for several weeks. The plaintiff was injured by falling on the slippery sidewalk and the municipality was liable, as it was the duty of the municipality to keep its sidewalks in a reasonably safe condition, *Bucher v. Sunbury Borough*, 216 Pa. 89, 64 Atl. 906.

Sec. 233. Defective highway—What is a defect? It is for the jury to say whether a wire running from the top of a fruit stand to a stringer in a plank sidewalk is an obstruction on the sidewalk, *Johnson v. City of Fargo*, (N. D. 1906) 108 N. W. 243. Where the brick pavement of a street was 3½ to 4 inches lower than the curb stone, the city was liable for damages to the plaintiff who was injured by stumbling over the curb stone at night, *Gillard v. City of Chester*, 212 Pa. 338, 61 Atl. 929.

HOMESTEAD

Homesteaders' rights in railroad location, see *post* §480.

Running of statute of limitations as to, see *post* §513.

Irrigation works on homestead lands, see *post* §285.

Sec. 234. Who may claim—Family—Head of family.

Homestead may be claimed by the husband, wife, or any unmarried person who is the head of a family, Ariz. Laws of 1907, Ch. 79, Sec. 1 and 3. Under Article 244 of the Louisiana Constitution it is not a condition precedent to a claim by a married man of a homestead that his wife has no property in excess of \$2,000 in value. His homestead is exempt although his wife and minor children are not living with him at the time of the seizure, *Garner v. Freeman*, 118 La. 184, 42 S. 767.

Estoppel. When a sale is made of homestead lands and the proceeds are not reinvested but used to pay her husband's debt, a wife has no rights in the homestead property if she knew of the fraud and she is precluded from recovery by her own laches, *Cheney v. McWhorter*, 125 Ga. 168, 53 S. E. 1003.

Family. A son 40 years old, without occupation, who lives with his mother, on whom he depends for support, constitutes with her a family under the provisions of the homestead law, *Sheeby v. Scott*, 128 Ia. 551, 104 N. W. 1139.

Head of family. Under the homestead laws a man who lives on his place after his wife's death with his granddaughter and a housekeeper, having entire control over the granddaughter and supporting her, is the head of a family of which the granddaughter is a member, *Adams v. Clark*, 48 Fla. 205, 37 S. 734. Under Hurd's Illinois St. 1903, c. 52, p. 943, section 1, *et seq.* as to homesteads, a husband living with his family is a householder and head of the family vested with a freehold, the right of the wife and children therein being contingent upon the conditions imposed by the statute, it is not a freehold giving them a right of appeal to the Supreme Court, *Taylor v. Taylor*, 223 Ill. 423, 79 N. E. 139.

Widow. Although a widow's claim of dower reduced the acreage of the homestead to within the exemption limit she was not entitled to have the homestead set apart to her before administration, *Dake v. Sewell*, 145 Ala. 581, 39 S. 819. In

Alabama where the deceased leaves a homestead owned by him in common with another, and other lands in addition, his widow must take as her homestead the one her husband occupied and cannot select another from his other lands, *McGaugh v. Davis*, (Ala. 1907) 43 S. 745.

Sec. 235. Title necessary or acquired—Buildings. Homestead may be selected from community property; from that of the husband; or that of the wife—if she join in making the claim, *Ariz. Laws of 1907, Ch. 79, Sec. 4*. In Illinois a householder need not have title in fee upon which to predicate a homestead right, *Daughters v. Christy*, 223 Ill. 612, 79 N. E. 292. A husband may claim that his homestead is exempt from execution though the fee is vested in the wife, *Bremseth v. Olson*, (N. D. 1907) 112 N. W. 1056. The homestead right of a wife in land which her husband holds under a contract of purchase depends entirely upon his equitable title and is extinguished by his abandonment of the contract, *Ferris v. Jensen*, (N. D. 1907) 114 N. W. 372.

Life estate only. Under the Illinois Homestead Act of 1857, the householder's right was merely to an exemption from judicial sale of the land and buildings occupied as a residence, to the value of \$1,000, and continued for the benefit of his widow and family until the youngest child came of age and the widow died. Where, therefore, the heirs of a deceased owner filed a partition bill against the grantee in a quitclaim from his widow and her then husband, which conveyed all of the deceased owner's land, a decree which assigned to the defendant therein certain land "as his homestead in lieu of other claims he may have in and to all of said lands," such defendant took a life estate therein and at his death the statute of limitations at once began to run against the heirs of the deceased owner, *Bechdoldt v. Bechdoldt*, 217 Ill. 537, 75 N. E. 557.

Buildings. When the total value of a lot of land, house and storehouse did not exceed \$1,000, the owner can claim a homestead within Kentucky Statutes 1903, section 1702. A storehouse in such a case is a mere appurtenance to the homestead, *Green & Sons v. Pennington*, (Ky. 1907) 97 S. W. 766. Under Sec. 208 of the Constitution a lot less than 2 acres in area on which stands a building used mainly as the family residence and incidentally for business and worth \$4,200 above

a mortgage of \$2,800 is a homestead to the extent of \$5,000, not deducting the value of the mortgage, *Calmer v. Calmer*, (N. D. 1906) 106 N. W. 684.

Sec. 236. Extent and value of land—Separate tracts.

Land claimed for a homestead must be in a compact body and not exceeding \$2,500 in value, *Ariz. Laws of 1907, Ch. 79, Sec. 1*. Sec. 3453 *Rev. Laws 1905* specifying area of homestead exemptions is amended by *Minn. Laws 1907, Ch. 335*. Code Sec. 2978, limiting the extent, and Sec. 2981, providing for substitution of homestead, construed, *Shaffer Bros. v. Chernyls*, 130 Ia. 686, 107 N. W. 801. Civ. Code ss. 1237, 1260, relating to a homestead, was construed as exempting adjoining desert land from levy by a creditor although no use was made of it at the time by the settler. Water rights used for the homestead acquired by appropriation were also exempted, *Payne v. Cummings*, 146 Cal. 426, 80 Pac. 620. The Louisiana Supreme Court has appellate jurisdiction of all suits "involving homestead exemptions." When the homestead exceeds \$2,000 in value, it may be sold under legal process, the beneficiary being entitled to that amount in case the sale realizes more than that sum, *Reily v. Johnston*, 119 La. 119, 43 S. 977. In Mississippi a homestead in towns or villages is measured by its value, not exceeding \$2,000, and is unaffected by territorial extent, *Stevens v. Wilbourn*, 88 Miss. 514, 41 S. 66.

Separate tracts. Two 10-acre tracts of land touching at the corners only and connected by a road may, if cultivated as one farm, constitute a homestead even if the buildings are all on one tract, *Brixins v. Reimringer*, 101 Minn. 347, 112 N. W. 273. Land claimed for a homestead must be in a compact body, *Ariz. Laws of 1907, Ch. 79, s. 1*. A tract of land two miles away from the owner's residence may be part of his homestead if used as such and furnishing part of the owner's living, *Gaar, Scott & Co. v. Reesor*, (Ky. 1906) 91 S. W. 717.

Sec. 237. Occupancy necessary. A homestead is intended to be occupied as a home, not to be rented out or used as a trap for an innocent lender of money, *Hollins v. Cropper*, 115 La. 987, 40 S. 378. Land owned by an unmarried man becomes a homestead upon his marrying and taking up his residence upon it with his family; under the Code Sec. 2974

a contract to sell to which the wife is not a party, is void, *Hostetler v. Eddy*, 128 Ia. 401, 104 N. W. 485.

Where an owner intended to occupy the tract as his homestead, had a house in process of construction into which he expected to move, had cleared and fenced fifteen acres, planted turnips, and was hauling corn to the crib when he died, his widow was *not entitled* to a homestead exemption therein, *Shell v. Young*, 78 Ark. 479, 95 S. W. 798.

The Arkansas Constitution limits a homestead in an incorporated town to one acre. And when a debtor sells his home and absconds, and his wife moves a few household goods into a dilapidated cabin on land which creditors are about to seize, the trial court may be justified in finding that her occupation thereof was merely colorable with no real intention of occupying it as a home and therefore that she acquired no homestead therein, *Gibbs v. Adams*, 76 Ark. 575, 89 S. W. 1008.

When a husband conveyed his homestead to his wife and for several years they lived together thereon but later moved away and she rented it to tenants this latter act amounted to a giving of possession to her which vested in her a good title under the Illinois Exemption Act requiring possession by the wife under a conveyance of homestead not subscribed by both, (*Hurd's Rev. St.* 1905 c. 52), *Coon v. Wilson*, 222 Ill. 633, 78 N. E. 900.

Sec. 238. Selection and declaration—Undivided interests. The person claiming a homestead must make his claim in writing, giving a description of the land, its value and showing that he is the head of a family, and must file it with the county recorder, *Ariz. Laws of 1907, Ch. 79, Sec. 2*. When a husband and wife had neither of them filed a homestead declaration as required by *Rev. St. 1898, s. 1150*, a mortgagee might foreclose on the property although they occupied it as their homestead, *Nielson v. Peterson*, 30 Utah, 391; 85 Pac. 429. The use of property of the wife as a homestead for some years establishes the presumption of her consent and amounts to sufficient selection, *Hobson v. Huxtable*, (*Neb. 1907*) 112 N. W. 658. Under Kirby's Arkansas Digest section 3902 a debtor need not file a schedule to protect his homestead against a judgment or execution, *Isbell v. Jones*, 75 Ark. 591, 88 S. W. 593.

A contract made by a husband and wife with their workmen that if they would stay with them they should have their farm when they "were through with it," amounts to an express reservation of the homestead, and is valid, *Reilly v. Reilly*, (Ia. 1907) 110 N. W. 445.

Undivided interests. A debtor owning a one-third undivided interest in land must have a partition of the land before he will be entitled to claim a pony homestead exemption as provided by Civ. Code 1895, s. 2866, *Sims v. Sims*, 122 Ga. 777, 50 S. E. 937. Where a debtor inherited an undivided interest in land, which was not divisible without great depreciation, rendering a sale necessary, and also unimproved and unsuitable for a home, he was entitled to have a sale thereof by judicial process and invest the proceeds in a homestead for himself and family exempt from preexisting debts, *Roberts v. Adams*, (Ky. 1906) 96 S. W. 554.

Sec. 239. Debts for which a homestead is liable—Mechanic's lien. *Hurd's Illinois Rev. St.* 1905, c. 32, Sec. 88, that part of the homestead and loan association law with reference to usury, construed, *Free Home Bldg Ass'n. v. Edwards*, 223 Ill. 126, 79 N. E. 64.

Creditors who have put money into the property. A homestead is liable for a claim for purchase money, *Clifton Land Co. v. Davenport*, 130 Ia. 94, 106 N. W. 365. In Kentucky when a defendant borrowed money from the plaintiff to buy land, sold the tract so purchased and invested the proceeds in another lot the latter tract was not exempt as a homestead, *Hensley v. Webb*, 31 Ky. Law Rep. 87, 101 S. W. 375. A partner who buys all the firm assets paying therefor partly in cash and partly by the assumption of all the debts when sued by the retiring partner for not paying these debts cannot claim a homestead exemption out of the assets, *Platt v. Platt*, 50 Fla. 594, 39 S. 536. Although a creditor acted as "receiver" in selling homestead lands and reinvesting the proceeds when he had a judgment lien good against the homestead, yet he was not estopped from enforcing the lien against the property in which the homestead fund had been invested, *Johnson v. Thomason*, 120 Ga. 531, 48 S. E. 137. Where a buyer secures a loan from a building association to secure an advance of the whole purchase price he cannot create a homestead therein so as to invalidate the mortgage by later moving into the property

in accordance with an earlier unexpressed intention to make it his homestead, *Home Bldg. & L. Ass'n v. McKay*, 217 Ill. 551, 75 N. E. 569. When land is bought from the proceeds of the crops grown with the aid of horses and tools exempted and set apart as homestead, it is subject to the lien of a creditor who advanced supplies on the faith of the title without notice of its homestead character. Recording the homestead exemption is not enough to put the creditor on inquiry, *Reed v. Holbrook*, 123 Ga. 781, 51 S. E. 720.

Right of debtor to surplus at sale. When a homestead is sold at a judicial sale for a debt against which it is not exempt the debtor may claim the surplus as exempt to enable him to buy another homestead. Action by him is timely if brought before the sheriff or purchaser has paid out the surplus, *Johnson v. Agurs*, 116 La. 634, 40 S. 923.

Mechanics lien. In Louisiana a materialman's lien on a homestead only extends to the building constructed or repaired and the lot, not exceeding one acre, on which it stands, *Rice Mill Co. v. Benoit*, 117 La. 999, 42 S. 480. Rev. St. 1899, §1156, which provides that a homestead shall be subject to mechanic's liens for work done on it, construed as contrary to Utah Const. Art. 22, § 1, and therefore is void, *Volker-Scowcroft Land Co. v. Vance*, (Utah 1907) 88 Pac. 896.

Prior creditors. Kentucky St. 1903, section 1702, providing that a homestead exemption shall not apply to a sale on execution upon a claim existing prior to the purchase of the land, construed, *Cowan McClung & Co. v. Evans*, 31 Ky. Law Rep. 226, 101 S. W. 964. Where an assignee of an insolvent debtor out of the proceeds of the sale of the home place paid the debtor's wife \$1,000 as homestead exemption and she at once gave this money to the purchaser for an option on the place for \$1,000 less than the sum he paid, a conveyance to her in compliance with such option was fraudulent and void as to a creditor of the original debtor whose claim existed before such debtor bought the homestead, *Porter v. Hart Co. Deposit Bank*, (Ky. 1906) 96 S. W. 832.

Sec. 240. From what debts exempt—Creditor's rights Purchaser. Alabama Code 1896, sections 2106 and 2107 as to waiver of a homestead exemption, construed, *Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 S. 123. A husband's homestead right in the land of his deceased wife is purely

personal to him, is not subject to the claims of his prior creditors, and if elected by him in lieu of his distributive share, may not be set aside by them, *E. P. Piekenbrods & Sons v. Knoer*, (Ia. 1907) 114 N. W. 200. Where an execution debtor has once claimed an exemption in lieu of a homestead, upon later inheriting a sum of money from her brother's estate she may claim an additional exemption therein, provided the total claim, in lieu of homestead, does not at any time exceed the value of \$500, *Hart & Co. v. Cole*, 73 Ohio St. 267, 76 N. E. 940. Where a wife owned a lot of land and neither husband nor wife owned any other property in the state, it was not subject to a judgment against both husband and wife when its value was less than \$1,000 as it was exempt as a homestead, and neither could it be levied on after a sale by the husband and wife, *Warneke v. Kearse*, *Ex parte Miley*, 73 S. C. 325, 53 S. E. 535. When a debtor in 1888 sold his homestead for \$1,000, invested \$500 thereof in a new farm conveyed to his wife and in 1897 exchanged it for another tract, it was held that a creditor who had no rights to subject the original homestead to the payment of his claim had no rights against the tract acquired by the debtor in 1897, *Collins v. Collins*, (Ky. 1907) 99 S. W. 653.

Prior to Mch. 1, 1906, when Sec. 3458, Rev. Laws 1905 went into effect, the process of garnishment reached money owing by the garnishee which was derived from the sale of a homestead and which the garnishee intended at the time of the service of the summons to use in the purchase of another homestead within one year from the time of sale, *Fred v. Bramen*, 97 Minn. 484, 107 N. W. 159.

Notice to purchaser. Although the widow of the deceased lived on the property secured by a deed of trust, her possession was not notice to a purchaser at a foreclosure sale under the deed of trust that the widow was entitled to a homestead, although the sale of the property was voidable because the other property, excluding the homestead, was not sold first, *Weber v. McCleverty*, 149 Cal. 316, 86 Pac. 706.

A delay of more than six years from the time of the closing of the settlement of debtor's estate will prevent creditors from enforcing their claim against the homestead, which, though originally exempt, became liable on the widow's remarriage, *In re Emmons' Estate*, 142 Mich. 299, 105 N. W. 758. Cal. Code Civ. Proc. §1475 and Sec. 1500 were con-

strued to render invalid the claim of a mortgagee against a homestead when his claim was not presented to the administrator within the required time after the death of the mortgagor, *Hibernia S. & L. Ass'n v. Hinz*, (Cal. 1906) 88 Pac. 730.

Sec. 241. Abandonment—Removal—Sale—Renting. For abandonment there must be (1) permanent removal from the Territory, (2) a grant, or (3) a declaration of abandonment properly executed and recorded, *Ariz. Laws of 1907, Ch. 79 Sec. 5*. For evidence showing abandonment of a homestead see *Smith v. Spafford*, (N. D. 1907) 112 N. W. 965.

Removal. The Louisiana Supreme Court has jurisdiction of all "suits involving homestead exemptions." When a debtor removed to another state with his family the exemption was waived and an ordinary mortgage could be enforced against the homestead, (*Provosty J. dissenting*) *Rice Mill Co. v. Benoit* 117 La. 99, 42 S. 480. When the owner of a homestead goes with his family to a new town where he practised his profession, registered as a voter, buried his wife and himself died without again seeing the homestead, except perhaps by chance, he has abandoned it although he may have said he would like to keep it for his children, *McGregor v. Kellum*, 50 Fla. 581, 39 S. 697. Although a debtor has a homestead assigned to him, yet it becomes subject to attachment by his creditors when the family of the debtor after his death ceases to reside within the state, either from death or removal, and a creditor who had acquiesced in setting apart the homestead is not estopped from levying an attachment on it, *M. S. Bailey & Sons v. Wood*, 71 S. C. 36, 50 S. E. 631. Under U. S. 2179 and 2189, a husband cannot convey a homestead without the joinder of his wife, but when he and his wife have abandoned the homestead so it is no longer "kept and used" as such, the fact that no other homestead had been acquired did not invalidate a deed given by the husband alone as the property was no longer a homestead after its abandonment without the intention to return. A subsequent deed given to the plaintiffs by both husband and wife with notice of the previous deed was void, *Cushman v. Davis*, 79 Vt. 111, 64 Atl. 456.

Sale. Under Kentucky Statutes 1903 section 1707 the sale of a homestead by a widow amounts to an abandonment thereof by her, and the infant children at once have the sole

right to its use until the youngest child becomes of age, Davidson v. Marcum, (Ky. 1905) 89 S. W. 703.

Renting. Under Ky. St. 1903, §1707, a widow does not retain her homestead by renting it to a tenant after she has remarried and moved to the home of her new husband, Bloch v. Tarrents' Adm'r, (Ky. 1906) 91 S. W. 275.

Sec. 242. Abandonment—What is not—Temporary absence. The owner of adjoining tracts may sell the one occupied as a homestead and after an interval of six months move to the other and occupy it as a homestead without any loss of homestead rights as to any one except the purchaser, Lutz v. Ristine & Ruml, (Ia. 1907) 112 N. W. 818.

Temporary removal. Sec. 589 Oklahoma Code of Civ. Procedure (Wilson's Revised & Annotated St. 1903, 4787) was construed to allow a homestead occupant, who had left the homestead to educate the children, the right to maintain an action to remove a cloud from the title as he was not held to have abandoned it, Womble v. Picke, 17 Okl. 122, 87 Pac. 427. The fact that an owner of a homestead in Kentucky the day before he sold it shipped some personal property to Arkansas and spent the night with a neighbor does not constitute an abandonment of the homestead, Hobson v. Noel, (Ky. 1906) 97 S. W. 388.

A hotel, if occupied as a dwelling and intended by the owner to be his homestead, may be such; and a temporary removal will not change its status, Bartle v. Bartle, (Wis. 1907) 112 N. W. 471.

Fire—renting. Where after a house occupied by a married woman and head of family as her homestead burned down and she did not at once rebuild but leased it to a tenant who built some small buildings thereon which he was to be permitted to remove at the end of his term, and the landlord always intended to later rebuild and live there, she had not abandoned her homestead, Gazzola v. Savage, 80 Ark. 249, 96 S. W. 981.

Persons forced to leave. Ballinger's Ann. Codes & St. Sec. 5214 is considered, but if a wife does not reside on the homestead because her husband has driven her away by his cruel and abusive treatment, she does not forfeit her right to a homestead, Murphy v. Neylon, Murphy's Estate, In re, (Wash. 1907) 90 Pac. 916. A husband and wife occupying a

homestead were separated, the husband being sentenced to the penitentiary and the wife going to an insane asylum, but the removal of the children did not constitute abandonment, and a sale of the property by one holding power of attorney from the husband who executed a deed in his own name and as guardian of the wife obtained the approval of the court to a sale of the wife's interest in the property, did not constitute a legal sale, and the subsequent acts of the husband in receiving the balance of the purchase price and approving the sale did not constitute a valid ratification as nothing he could do in the absence of his wife would defeat his or her right to claim the homestead, *Withers v. Love*, 72 Kan. 140, 83 Pac. 204.

Sec. 243. Conveyance and incumbrance. Although a married woman had property entered as homestead when she obtained a divorce the lien was not released from it of a trust deed to the property which she gave to her attorneys conducting her divorce before the land was separately allotted to her. See *Mills Ann. St.* §2137, providing that "nothing in this act shall be construed to prevent the owner of any homestead from voluntarily mortgaging the same," *Patrick v. Morrow*, 33 Colo. 509, 81 Pac. 242.

Redemption from mortgage. When part payment of a mortgage on a homestead and other property had been made and a sum sufficient to discharge the homestead had been offered a bill to restrain foreclosure as to the homestead should not have been dismissed. The court should have found what was actually due on the mortgage and given the complainant a chance to redeem, *Gray v. Bryson*, 87 Miss. 304, 39 S. 694.

Sale. Where the owner of a place exempt as a homestead agrees to sell it as soon as the homestead exemption is removed and accepts part of the purchase price of the place without approval of the court, the sale is a nullity and a decree to put the plaintiff again in possession of the surrendered premises may then be rendered, when no judgment is demanded for mesne profits by the plaintiff, *Williford v. Denby*, 127 Ga. 786, 56 S. E. 1010. As an owner of a homestead can dispose of it for any purpose whatsoever the person who buys it from him is protected as against the seller's creditors even although he have actual knowledge of the seller's intention thereby to defraud his creditors, *Hobsen v. Noel*, (Ky. 1906) 97 S. W.

388. Under Sec. 117, c. 23, Comp. St. 1907, an action by an heir to set aside a sale of a homestead may be brought at any time within 10 years after his right of action accrues or the attainment of his majority, *Holmes v. Mason*, (Neb. 1908) 114 N. W. 606. An order of court for the sale of a homestead of less value than \$2,000 for the payment of decedent's debts, is absolutely void, *Holmes v. Mason*, (Neb. 1908) 114 N. W. 606.

Sec. 244. Conveyance and incumbrance—Necessity of joint conveyance by husband and wife. A contract for the conveyance of a homestead may be executed by the wife after the husband provided the purchaser has not in the meantime repudiated it, *Kettering v. Eastlack*, 130 Ia. 498, 107 N. W. 177.

Husband signing for wife. A conveyance of a homestead, executed by the husband in his personal capacity and as attorney for his wife is invalid, *Keeline v. Clark*, 132 Ia. 360, 106 N. W. 257. 2 Hills Ann. Codes & St. sec. 483 was construed to invalidate a mortgage on a homestead given by the husband as guardian during the insanity of the wife, when the mortgage was made before passing *Ballinger's Ann. Codes & St. par. 5239*, *Curry v. Wilson*, (Wash. 1906) 87 Pac. 1065.

Necessity of wife's signature. A conveyance by a husband of his homestead worth \$4,000 to a third person for \$500, while insane concerning the character and conduct of his wife, in which deed she did not join, equity will order cancelled, *Moseley v. Larson*, 86 Miss. 288, 38 S. 234. Upon the evidence it was held that no possession having been given to the grantee under a conveyance of a homestead not subscribed by the householder and wife, it was void under the Illinois Exemption Act, *Venters v. Wickens*, 224 Ill. 569, 79 N. E. 946. As a deed of a homestead without the wife joining in the conveyance is an absolute nullity no valid decree for a sale can be made upon a bill by a creditor of the husband to foreclose an incumbrance on the homestead executed by him alone, *McDonald v. Sanford*, 88 Miss. 633, 41 S. 369. A conveyance for life by the husband to his wife of the homestead with the remainder over to the husband's brother did not create a constructive trust in favor of the brother, as the wife, who survived her husband, was entitled to the absolute interest in

the homestead under the homestead laws, and no conveyance of the homestead unless executed by her could pass her title to a third party, *Loomis v. Loomis*, 148 Cal. 149, 82 Pac. 679.

Conveyance signed by both. A conveyance by a husband and a wife of her separate estate occupied by them both as a homestead to secure a debt of the husband is absolutely void and at her death the title vested in her surviving minor children, cutting off any estate by the curtesy in the husband, *Harper v. T. N. Hays Co.*, (Ala. 1907) 43 S. 360. Where in the body of a mortgage deed the wife's name appeared with her husband as a mortgagor and the habendum clause was as follows: "To have and to hold together with the appurtenances thereto belonging, and all the estate, right, title and interest of the said parties of the first part therein": it was held that the wife's right of homestead passed thereunder although not expressly mentioned, *Long v. Branham*, (Ky. 1907) 99 S. W. 271. A wife, in consideration of a loan made to her husband, and from which she received no personal benefit, secured the loan by a deed of her land to the lender; the wife's property was to become liable in event of her husband's default, who was not in any manner acting as her agent. The lender conveyed the land by deed to the plaintiff, who had both actual and constructive notice of the facts. While a wife is given the right to contract as a feme sole and to own property, yet she cannot bind her separate estate by any contract of suretyship nor by any assumption of the debts of her husband; and any sale of her separate estate made to a creditor of her husband in extinguishment of his debts shall be absolutely void. [Civ. Code 1895, §2488.] Also the property of the wife shall not be liable for the payment of any debt, default or contract of her husband. [Civ. Code 1895, §2474.] The plaintiff claims under deed from the lender, and as he took with notice of the invalidity of that title, his title is no better. The deed under these circumstances is void, *Gross v. Whiteley*, 128 Ga. 79, 57 S. E. 94.

Statutes. Wife must join in sale or lease of homestead or creation of lien thereon, Ariz. Laws of 1907, Ch. 79 Sec. 6. In Louisiana a married woman may sign a binding renunciation with her husband of a homestead without an examination out of her husband's presence or a recital in the deed that she observed the formalities required by Civil Code, article 129 as to her paraphenial rights, *Cormier v. Hoyt*, 116 La. 602, 40

S. 912. Homesteads are protected in foreclosure proceedings by Minn. Laws 1907, Ch. 389. Shannon's Tennessee Code, section 3798, which provides that a homestead may be sold by the joint consent of the husband and wife construed in connection with the Tennessee Constitution, Article 11, section 11, *Charnness v. Parrish*, (Tenn. 1907) 103 S. W. 822. Sess. Laws 1895, p. 109, c. 64, relating to the sale of a homestead and the requirements to secure the validity of the sale were construed, *Waldron v. Kineth*, 41 Wash. 459, 84 Pac. 16.

Estoppel. Although a wife did not sign a lease by the husband of the right to mine salt on the homestead, she and their grantee were equitably estopped from interfering with the lessee who had expended large sums of money on the homestead with the full knowledge of the wife, and a protest by her to her husband and not to the lessee was insufficient to give any right to cancel the lease, *Shay v. Bevis Rock Salt Co.*, 72 Kan. 208, 83 Pac. 202. When a wife has given her full consent to the sale of the homestead by her husband and is fully informed about the transaction, she is estopped to object after the purchaser has gone into possession, made improvements, and paid the purchase price, and the provisions of the homestead laws, Revised Statutes of 1887, Sec's 2921, 2922, 3040, and 3041, do not apply, *Grice v. Woodworth*, 10 Idaho 459, 80 Pac. 912.

Sec. 245. Effect of divorce or separation on rights to homestead. Under Rev. Laws 1905, Sec. 3456, the conveyance of the homestead by a married man, whose wife is leading an adulterous life, without her signature to the deed, is void, *Murphy v. Renner*, 99 Minn. 348, 109 N. W. 593. A wife will not be permitted to maintain an action for the partition of a homestead by sale, after she has left it and her husband, owing to his cruel treatment of her, *Grace v. Grace*, 96 Minn. 294, 104 N. W. 969. A decree of divorce for the adultery of the wife, in which she was granted a specific sum as alimony and which expressly adjudicated that neither party had any right in the estate of the other estops the wife from claiming a homestead and one-third interest in the husband's real estate, *Linse v. Linse*, 98 Minn. 243, 108 N. W. 8.

Sec. 246. Rights of surviving wife and children. When at the date of the decease of a husband the law gave a widow

only a life estate in his homestead the Legislature could not later pass an act under which she took a fee, *Bailes v. Daly*, 146 Ala. 628, 40 S. 420. Under Code Sec. 2985, a homestead devised to a son of the testator is subject to the son's antecedent debts, *Rice v. Burkhart*, 130 Ia. 520, 107 N. W. 308.

Heirs who receive payments from the widow for their interests in the homestead, believing that the title thereby was vested absolutely in her, may not, after 10 years, assert their title against a purchaser in good faith from the widow, *Staats v. Wilson*, (Neb. 1907) 107 N. W. 230. If a widow living on a homestead dies in eight months after the death of her husband, and in that time has not applied for a year's support although she had plenty of opportunity to do so then her heirs cannot have a year's support set aside from the homestead allotment which was all that remained of testator's estate, *Ehrlich v. Silverstein*, 121 Ga. 54, 48 S. E. 703. Where husband and wife were tenants in common she could not devise the whole, used as a homestead, in such a way as to prejudice the rights of her husband or his beneficiaries, *Frederick v. Frederick*, 219 Ill. 568, 75 N. E. 856.

A devise to testator's wife of "my homestead, consisting of 30 acres on the south-east corner of section 5" and in another clause to his son of "all my lands on sections 2 and 4 * * * reserving the right of my widow to occupy the homestead during her natural life" where testator's homestead was on section 2 and he had not 30 acres on section 5 gives the widow a life estate in the homestead, *Thorn v. Scofield*, 143 Mich. 473, 107 N. W. 100.

Renunciation of will. When the testator devised his homestead to his wife and created a trust fund the income of which was to go to her during her widowhood, and upon her death or marriage the principal be divided among the testator's children by her, upon the wife renouncing the will the children took the trust fund and the homestead fell into the general estate, *Callicott et al v. Callicott*, (Miss. 1907) 43 S. 616.

Death of child. The guardian of an imbecile brought action to recover possession of land and for mesne profits. The title pleaded was the interest of the ward as sole beneficiary of a homestead estate. Pending action the ward died. Her death being suggested of record, the suit was ordered to proceed in the name of the guardian as an administrator of

his ward's estate. The defendant filed a plea in abatement, alleging that, on account of the termination of the homestead estate by the death of the sole beneficiary, her legal representative had no further interest either in the land or in mesne profits which had accrued during her lifetime. This plea was sustained and judgment affirmed, *Rowan v. Combs*, 121 Ga. 469, 49 S. E. 275.

Partition—Increase in value. Mississippi Code 1892, section 1553 which provides that a widow to whom with others exempt property descends may not be forced to have partition thereof during her life-time, construed. If when the owner dies a homestead is within the exemption limit a later increase in value gives the creditors no rights, *Moody v. Moody*, 86 Miss. 323, 38 S. 322.

Statutes. Alabama Code 1896, sections 2069 and following as to the rights of a widow and minor children in a homestead, construed, *Hosea v. Davis*, 142 Ala. 211, 39 S. 315. Under the Alabama homestead statutes 160 acres of land not worth in excess of \$500 vest in the widow and minor children of the deceased absolutely from the time his estate is declared insolvent, *Snell v. Roach*, (Ala. 1907) 43 S. 189. Under Alabama Code of 1886, section 2543, a judicial ascertainment of insolvency is a necessary condition precedent to the enlarging of a widow's life estate in her husband's homestead into a fee. The maxim that "equity regards and treats that as done which in good conscience ought to be done" has no application to a judicial act. The heirs are necessary parties to a bill to have the estate declared insolvent and may by demurrer assert the statute of limitations as a bar to claims against it, *O' Daniel v. Gaynor*, (Ala. 1907) 43 S. 205.

A decedent's six infant unmarried children, four by one wife, and two by another, were by virtue of Ky. St. 1903, section 1707, joint tenants of his homestead, and a guardian of the two who collected the rents of the homestead must account therefor to all six, *Potter v. Redmon's Guardian*, (Ky. 1906) 96 S. W. 529. When the deceased at the time of his death had the equitable title in an exempt homestead his widow under Mississippi Rev. Code 1871 section 1956 was entitled only to a child's part in fee simple, *Warren v. Davis*, (Miss. 1907), 43 S. 604. The fee of a widow's homestead may be sold by the probate court to pay her husband's debts, subject to her rights, *Robbins v. Boulware*, 190 Mo. 33, 88

S. W. 674. A widow with no minor children is entitled to the growing crop on her husband's homestead at the time of his death, *Mahoney v. Nevins*, 190 Mo. 360, 88 S. W. 731. Missouri Rev. St. 1899, sections 3621 and 2944, as to the rights of homestead and dower of a widow where her husband leaves minor children, construed, *Quail v. Lomas*, 200 Mo. 674, 98 S. W. 617. Missouri Laws 1895, pp. 185, 186, being an amendment of the homestead law making a widow's rights in a homestead determinable upon her remarriage, construed, *Chrisman v. Linderman*, 202 Mo. 605, 100 S. W. 1090. Sec. 6216 *Cobbey's Ann. St.* 1903, providing that a surviving husband or wife shall have a life interest in a homestead selected from the separate property of the deceased and that it shall then pass to his heirs, construed, *Brichacels v. Brichacels*, (Neb. 1906) 106 N. W. 473. The homestead claim of a widow and minor children left in "necessitous circumstances" as explained in Louisiana Civil Code 1870, article 3252 is superior to the "expenses of last illness," *Succession of Campbell*, 115 La. 1035, 40 S. 449. Ch. 37, Rev. Stat. 1899, "Homesteads" is amended by adding Sec. 3620a, prescribing the persons in whom the homestead shall vest on death of widow, Mo. Laws 1907, p. 300. Ch. 37 Rev. Stat. 1899, "Homesteads" is amended by substituting a new Sec. 3620 for the old Sec. 3620, providing for the rights of children and widow, Mo. Laws 1907, p. 301.

Sec. 247. Judgments—Practice. A judgment of a probate court setting aside a homestead as exempt under Alabama Code 1896, section 2070, et seq. is not subject to collateral attack, *Jenkins v. Clisby*, (Ala. 1905) 39 S. 735.

An appeal from an order quashing an execution upon land of a debtor claimed to be exempt as a homestead does not involve the title to real estate and is therefore not appealable to the Supreme Court of Missouri, *Lawson v. Hammond*, 191 Mo. 522, 90 S. W. 431. See further *ante* §7.

For proceedings where creditor is dissatisfied with value of land claimed as homestead, see *Ariz. Laws of 1907*, Ch. 79, Sec. 7-13.

Sec. 248. Preemption of public lands for.

Homesteaders' rights on location of railroad right of way, see *post* §480, Kentucky Statutes of 1903, section 4703, as

to making settlements upon vacant or unappropriated land construed, *Kountze v. Hatfield*, (Ky. 1907) 99 S. W. 262. Rev. St. 1899, §4263, relative to the validity of entries upon land, construed, *Hoke v. Central Tp. Farmers' Club*, 194 Mo. 576, 91 S. W. 394.

Husband and wife. A homesteader under the federal homestead law gets title from the entry, the occupation and cultivation of the land for five years and the making of final proof being merely conditions imposed upon the title. It therefore becomes the joint property of the husband and wife if the community of acquets and gains existed at the date of entry although the proofs are made after her death, *Crochet v. McCamant*, 116 La. 1, 40 S. 474. Within less than three years after making a homestead entry the wife died and the husband commuted his homestead rights, making final proof and payment as he did not wish to reside on the property the requisite time to obtain the homestead patent. The heirs of the wife had no claim on the land as community property as the husband had obtained the absolute title, *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109.

Land abandoned. A. settled on a part of a piece of public land which was settled by B. subsequent to A.'s abandonment. A. and B. presented their applications for entry under the homestead laws simultaneously, but B. was entitled to the land as the land was abandoned by A. and therefore B. could settle on it, *Love v. Flahive*, 33 Mont. 348, 83 Pac. 882.

Crops and Improvements. A. planted wheat on land belonging to B., who had made an entry on the land under the homestead laws, and B. agreed to allow A. two-thirds of the crop. Then B. made a sale of his rights to C. and gave up his homestead entry so that C. could make an entry, and C. was entitled to all the improvements and crops on the land, and he was not compelled to allow A. any of the crops, as the title had reverted to the government free from any burden of any kind, *Moore v. Linn*, (Okl. 1907) 91 Pac. 910.

Possession. The plaintiff duly entered for a homestead government lands in the actual possession of the defendant enclosed by him with a substantial fence and used for agricultural purposes, but the filing of the homestead entry although succeeded by peaceable occupation did not convey any title to the plaintiff, *Gragg v. Cooper*, 150 Cal. 584, 89 Pac. 346. U. S. Comp. St. 1901, p. 1393, was construed to give a settler

on public lands whose absence from the land was enforced on account of a conviction for crime and sentence to the penitentiary, a right to regain possession of the lands from a subsequent appropriator so he could have the lands patented, *Huffman v. Smith*, 47 Or. 573, 84 Pac. 80.

Action. In Louisiana one in actual possession of land under the U. S. homestead laws, whose application to enter has been approved, may maintain a possessory action, coupled with an injunction against one who is cutting and removing trees thereon, *Mott. v. Hopper*, 116 La. 629, 40 S. 921.

Limitation on amount of land. Where a settler relinquishes his right of entry to B., and A. trespasses on the land and claims a right of entry, his claim is valid if B. receives a final certificate to other public lands in Oklahoma after A.'s adverse claim is made, and although B. sells the other government land patented by him, A. is entitled to complete his claim, as B. is disqualified from holding more than one piece of public land, *Gourley v. Countryman*, 18 Okl. 220, 90 Pac. 427.

Sec. 249. Alienation by government of public lands and forfeiture of rights therein—abandonment. Gen. Stat. 1894, Sec. 4028-4038, relative to the selection of state lands abandoned by the grantees, for state institutions, construed, *White & Street Townsite Co. v. J. Neils Lumber Co.*, 100 Minn. 16, 110 N. W. 371. An application to buy 160 acres of school lands in a designated section is sufficiently definite when the state only held one quarter in the section and it alone was on the market and had been properly advertised for sale, *Lindsey v. Terrell*, (Tex. 1907), 101 S. W. 1073.

Successive grants. If a State after making a grant of land to A., grants the land to B., the second grant is a nullity and there is no presumption that the State had reacquired possession, *Love v. Turner*, 71 S. C. 322, 51 S. E. 101. As between two grants from the state, where there has been no entry under either, the older one will be held binding, on the theory that it passed all the right of the state, *Sampson's Heirs v. Chester's Heirs*, (Tenn. 1904) 91 S. W. 43.

What land subject to sale. An embankment built out in a lake, with earth from the bottom, as a public levee, still used as such, is not subject to entry and sale as public land, although the bed of the lake belongs to the state, *State Ex rel Turner*

v. Blanchard, 117 La. 91, 41 S. 363. Land in the Salton desert which is dry and unfitted for cultivation because of alkali is "land unsuitable for cultivation" within the meaning of Pol. Code § 3495, although it may be rendered suitable for cultivation by boring artesian wells and proper irrigation, and an allotment of 640 acres to one person is valid, Robinson v. Eberhart, 148 Col. 495, 83 Pac. 452.

Forfeiture of rights and abandonment. Texas Laws 1901, p. 296, c. 125, section 5, providing for cancellation of leases of public lands when the annual rental has remained overdue for sixty days, construed, Willoughby v. Terrell, (Tex. 1906) 90 S. W. 1091. Sayles Ann. Civ. St. 1897, articles 4218 f and j and z as to reinstatement after forfeiture of rights in public lands for nonpayment of interest, construed, Mound Oil Co. v. Terrell, (Tex. 1906) 92 S. W. 451. Texas Laws 1901, p. 294 c. 125, section 3, as to what constitutes abandonment of public lands sold to private persons, construed, Andrus v. Davis, (Tex. 1905) 89 S. W. 772. Under Laws 1883, c. 74, Sec. 20, the assignee of a lease of school lands may redeem them from a forfeiture before the time set for offering them for sale, Hile v. Troupe, (Neb. 1906) 109 N. W. 218.

Estoppel of government. When there is no statute requiring the Land Commissioner to notify original purchasers or their vendees that the interest on land they had purchased from the state was not paid and their land liable to forfeiture, altho he had done so as a matter of accommodation to purchasers, the state cannot be estopped by his failure to comply with this custom so established by the office, Mound Oil Co. v. Terrell, (Tex. 1906) 92 S. W. 451.

The refunding of the price paid for state land when the purchaser has no possession or use is provided for by Mich. Acts 1907, No. 130.

Statutes. The price at which state lands shall be sold is regulated by Minn. Laws 1907, Ch. 366. Mississippi Statutes as to leasing a sixteenth section of lands owned by a county, construed, Sexton v. Sup'rs Coahoma County, 86 Miss. 380, 38 S. 636. The sale of lands acquired by the state under Laws 1903, Ch. 118 is authorized by Mont. Laws 1907, Ch. 188. The terms on which public lands shall be sold are prescribed by Neb. Laws 1907, Ch. 133, amending C. S. Ch. 80, Sec. 6. The rate of interest on contracts for the sale of pub-

lic land is prescribed by Neb. Laws 1907, Ch. 133. The assessment of taxes on educational and saline lands held on contract is provided for by Neb. Laws 1907, Ch. 135. Conveyances by townships are validated by N. J. Laws 1906, Ch. 176. Rents are made a first lien on public lands by N. Mex. Acts 1907, Ch. 104, Sec. 19. The leasing, sale and management of public lands is provided for by N. Mex. Acts 1907, Ch. 104. Documents showing title to lands granted by the United States to the State are required to be filed with records of deeds by Ore. Laws 1907, Ch. 76. The acquisition and control by the state of public lands are regulated in detail by Ore. Laws 1907, Ch. 117. Texas statutes as to the purchase of public lands by a lessee, construed, *Welhausen v. Terrell*, (Tex. 1906) 97 S. W. 79. Texas Constitution, article 7, section 6, giving a county authority to sell its lands as provided by the Commissioner's court construed together with Article 3, section 55, forbidding the Legislature from releasing or extinguishing the indebtedness of any person to a county, *Delta County v. Blackburn*, (Tex. 1906) 93 S. W. 419. For three cases construing various sections of the Texas Statutes as to the purchase of public lands, see *Fessenden v. Terrell*, (Tex. 1907) 98 S. W. 640; *Good v. Terrell*, (Tex. 1907) 98 S. W. 641; *Clark v. Terrell*, (Tex. 1907) 98 S. W. 642. Ch. 89, Sec. 14, Laws 1897, regulating sales of state lands is amended by Wash. Laws 1907, Ch. 152.

Sec. 250. Alienation of homestead claims in public lands.

Contract to convey inchoate rights. When the plaintiff entered into a contract with a settler to convey the homestead to him on the issuing of a patent thereto from the government, it was void and unenforceable and the plaintiff was not entitled to recover any of the consideration, *Jackson v. Baker*, 48 Ore. 155, 85 Pac. 512.

Sale of inchoate rights. Although a person holding land from the Federal Government under the homestead law cannot sell it before he gets a final receiver's receipt his testimony cannot be heard as having more weight than that of other witnesses who testify that he sold after, not before, he received the receipt, *Wood v. Noel*, 116 La. 516, 40 S. 857.

A lease for turpentine purposes in Mississippi made by a claimant before his homestead entry has been perfected was

valid when there was no evidence that operations under the lease were begun or intended to be until after the entry had been perfected, *Orrell v. Bay Mfg. Co.*, 87 Miss. 632, 40 S. 429. A lease by a homesteader six weeks before the issuance of his patent is not void because the court is justified in assuming that the final proof of entry had been made before the lease. Ordinarily the full beneficial interest and ownership vests in the homesteader upon receipt for final entry, and nothing remains for a perfect title but the mere routine act of signing the patent, which, owing to congestion or other conditions in Washington, usually requires many months, and sometimes years, *Walker v. Johnson*, (Fla. 1907) 43 S. 771.

Mortgage. A settler who had filed a homestead claim obtained a mortgage on the homestead before receiving the patent from the government, but he was estopped from asserting that the mortgage was not a valid lien on the land and the mortgagee obtained the benefit of the after acquired title. *Stark v. Morgan*, 73 Kan. 453, 85 Pac. 567.

HUSBAND AND WIFE

As to fraudulent conveyances between husband and wife, see *ante* §202.

As to curtesy and dower, see that title.

Mechanic's liens, affected by husband and wife, see *post* §335.

Mortgages of, see *post* §368.

Rights in homestead, see that title.

Sec. 251. Rights of married women over real estate.

Deeds of married women, defective in various respects, are cured by Ore. Laws 1907, Ch. 170, Sec. 2, 3, 4, 5.

A contract by a married woman to convey her land is not authorized by Rev. St. 1865, p. 109, §2, *O'Reilly v. Kluender*, 193 Mo. 576, 91 S. W. 1033. Married women's contracts for sale of real estate are made subject to Sec. 3335 Rev. Laws 1905, by Minn. Laws 1907, Ch. 417. A contract to convey, made by a husband, accompanied by a quitclaim deed of the wife, does not constitute a valid contract enforceable against both; the wife must join in the same instrument with the hus-

band, *Lott v. Lott*, 146 Mich. 580, 109 N. W. 1126. A contract for the purchase of property occupied by the vendee as a home will be foreclosed on failure of the vendee to pay according to its terms even though it was not executed by the wife as well as the husband, *Clifton Land Co. v. Davenport*, 130 Ia. 94, 106 N. W. 365.

Effect of conveyance of wife's interest alone. Under Alabama Married Woman's Act of 1887 a wife, whose husband was a non-resident, could execute a valid deed of trust to secure her debts although he did not join therein, *Collier-v. Doe exdem. Alexander*, 142 Ala. 422, 38 S. 244. A brother who contracts with his married sister alone for the conveyance to him of her interest in the joint property of herself and her husband may compel conveyance of only her interest, *Noecker v. Wallingford*, 133 Ia. 605, 111 N. W. 37. A married woman cannot, without joinder of her husband, consent to have the title to her real estate determined by an award of arbitrators, *Smith v. Bruton* 137 N. C. 79, 49 S. E. 64. To secure a loan from a building and loan association to pay for her separate property a wife executed a bond and with her husband a mortgage on her real estate. Held—Under Sec. 2208 Rev. St. 1892 the bond was void but the mortgage was valid and could be enforced in equity for the amount of the loan, *Equitable Bldg. & Loan Ass'n v. King*, 48 Fla. 252, 37 So. 181.

Conveyances as if sole. Shannon's Tennessee code section 4246, authorizing a married woman to dispose of land if she undergo a privy examination, construed, *Funkhouser v. Fowler*, 117 Tenn. 539, 101 S. W. 769. Kentucky Acts 1894, p. 176, c. 76, giving a married woman power to acquire and hold property as if unmarried, construed. *Noel v. Fitzpatrick*, (Ky. 1907) 100 S. W. 321. In Tennessee a married woman may accept, hold, and execute a trust relating to real estate, and she has the power, in the execution of the trust, to convey real estate without the concurrence of her husband or his joinder in the conveyance made by her, and this rule extends to trusts in which the husband of the trustee is the beneficiary, and to conveyances made in its execution directly to him, *Insurance Co. v. Waller*, (Tenn. 1906) 95 S. W. 811. Where a married couple quarrelled about the husband's interest in a building being erected on land standing in the wife's name, and he beat her in a personal encounter, and immediately thereafter she went to a notary and in the absence of the

husband executed a deed conveying to him the interest claimed by the husband, the deed was not void for duress or undue influence, *Hintz v. Hintz*, 222 Ill. 248, 78 N. E. 65. When a married woman makes a trust deed to real estate to be held by a trustee for her use during her life and to be conveyed to her husband on her death, the deed may be made valid by attesting before a clerk authorized to admit the deed to record that it is her free act and deed under Code of 1860 c. 121 s. 4 as amended by acts 1869-70 p. 173-175 c. 138. Although one of the tracts of land included in the deed is not within the county or corporation where it is recorded, the deed passes a valid title to that land and it does not descend to the heirs of the wife on her death, *Tarrant v. Core*, 106 Va. 161, 56 S. E. 228.

Power of attorney. In Kentucky a married woman's power of attorney to convey land is void and when her husband disposed of the consideration received by him for the conveyance, without her consent, the grantee of her land was not entitled to a lien thereon for the value of the consideration he paid, *Wright v. Begley*, 31 Ky., Law Rep. 53, 101 S. W. 342. A power of attorney by a wife authorizing her husband to release her dower in real estate is invalid under a statute providing that where property is owned by a husband or wife the other has no interest in it which can be the subject of contract between them. *Swartz v. Andrews*, (Iowa 1908) 114 N. W. 888.

Ratification. A husband who held no written power of attorney from his wife to sell her land could confer upon a third person by a written power of attorney no authority to contract to sell it. But when she accepted the purchase price knowing that the agent had executed a deed in her name she irrevocably ratified his acts, *Kirkpatrick v. Pease*, Mo. 1907) 101 S. W. 651.

Effect of coverture on running of statute of limitations. The Weissenger Act, (Ky. Acts 1894, p. 176, c. 76) permitting married women to hold land and sue as if sole did not remove the disability of coverture so as to allow the statute of limitations to run. When, however, a cause of action accrued to a minor girl in 1887 and she married while an infant and became a widow in 1897 her cause of action was barred in 1904 by the general statute of limitations, *Dukes v. Davis*, 30 Ky., Law Rep. 1348, 101 S. W. 390.

Deed for payment of her husband's debts. A married

woman may charge her separate property by mortgage to secure her husband's debt, *Goll v. Fehr*, 131 Wis. 141, 111 N. W. 235. When a wife applies a part of her own money to be put into a home unconditionally and without making a loan of the money, her heirs have no right to recover the money from her husband. *Kreider's Estate in re* 212 Pa. 587, 61 Atl. 1115. When the wife of a partner conveyed land to another partner in consideration of the settlement of the partnership debts, and upon reconveyance gave back a mortgage on the property, the transaction was not void as violating the married woman's law. *Bowen v. Day*, 71 S. C. 492, 51 S. E. 274. A wife in order to get a loan on land bound herself to pay a judgment against her husband, in order to free the apparent cloud on the title. She cannot say the obligation was entered into without consideration as a defence to the bond. A defence on the ground that the execution of the bond was an assumption of the debts of her husband and not binding was entered; but the land was relieved of an apparently valid lien so that she was able to get her loan, which was the real consideration and it was sufficient. *Atlanta S. Land Corp. v. Austin*, 122 Ga. 374, 50 S. E. 124. The act of 1891 (20 St. at large p. 1121) clothed a married woman with the right to contract and be contracted with, as if she were unmarried and "provided that nothing herein shall enable such married woman to become an accommodation indorser nor liable for the default of any other person." The court held this statute did not exempt married women from liability on a note or on a mortgage, the money from which she turned over to her husband who paid his debts. *McGee v. Cunningham*, 69 S. C. 470, 48 S. E. 473.

Disability of one spouse. If husband or wife is insane the other may convey as if unmarried. Ore. Laws 1907 Ch. 194. Missouri, Rev. St. 1899, s. 4334, as to sales by wives whose husbands are under guardianship, construed, *Dooley v. Greening*, 201 Mo. 343, 100 S. W. 43.

Action. An infant married woman when aided by her husband may sue in Louisiana for partition although not authorized by a judge or the advice of a family meeting, *Tobin v. U. S. Safe Deposit & S. Bank*, 115 La. 363, 39 S. 33.

Sec. 252. Title standing in name of wife. Where a divorced wife sues her former husband to recover certain

property he may show that it really belonged to him although he placed the title in her name to protect himself from an unjust claim, afterward decided in his favor, *Miller v. Miller*, (Mo. 1907), 103 S. W. 962. When a husband buys property and has the title placed in the name of his wife the presumption is that it was intended as a provision for her. When therefore upon an exchange of real estate title to which was in the wife the husband took title to the property exchanged in his own name without his wife's authority he held it as trustee for her and her heirs, *Siling v. Hendrickson*, 193 Mo. 365, 92 S. W. 105. Where a married woman holding title claimed that her later deed was void because not joined by her husband evidence is admissible to show that she held merely as trustee for her husband and that the conveyance is therefore valid. Where one purchases an estate with his own money, and the deed is taken in the name of another, a trust of the land results by implication, without any agreement, to him who advances the money, and the consideration moving from the cesti que trust need not be money: a bond or mortgage may be given for the deed, *Casciola v. Donatelli*, (Penn. 1907), 67 Atl. 901.

Sec. 253. Title taken in name of husband. Husband holding interest for wife. Where a husband has taken possession of the wife's property and uses it for her benefit, no lapse of time will prevent the wife from demanding an accounting, *Barber v. Barber*, 125 Ga. 226, 53 S. E. 1017. When a husband borrowed his wife's money to buy a part of a farm and promised the deeds should be made out to her as long as he lived, but the tract could not be deeded to her after his death on account of other circumstances, the wife was entitled to recover from the husband's estate the amount of her loan to him, and she was not barred by laches, *Cross v. Iler*, 103 Md. 592, 64 Atl. 33. When a wife mortgaged her separate real estate, the husband joining in the mortgage note, and by agreement with her husband he invested the money so obtained in other land which he had contracted to buy before his marriage the husband holds the title to such land as a trustee for his wife to the extent which the money she furnished bears to the whole purchase price, *Sparks v. Taylor*, (Tex. 1906), 90 S. W. 485.

Where a husband and wife purchase property the husband

taking the title, the wife is entitled to have a resulting trust declared for her benefit to reimburse her for the sums of money advanced to purchase the property as against her husband's creditors where she thought the property was in her name and there was no estoppel. A wife could not claim a resulting trust for money contributed which she received for keeping boarders, and not from a separate business enterprise. *Mayer v. Kane*, 69 N. J. Eq. 733, 61 Atl. 374. If a trust deed conveys to Mr. A "for the use, benefit and advantage of Mrs. A exempt from the marital rights of Mr. A. . . . for her sole and separate use", and the remainder going to her children, the trust deed creates a life estate in Mrs. A, and a sale upon an order of the chancellor of the circuit court approved by a temporary guardian ad litem and a subsequent delivery of a deed by Mr. A as trustee for Mrs. A only passes her life estate. *Smith v. McWhorter* 123 Ga. 287, 51 S. E. 474. When a husband and wife each supplied half of the purchase price of a piece of real estate and it was their intention to have the deed made out of a half interest to each of them, the heirs of the wife had a right to a half interest, although a deed was made out by mistake to the heirs of the husband, *Stalcup v. Stalcup*, 137 N. C. 305, 49 S. E. 210.

If there is a partition of land in which the wife alone has an interest as co-tenant, and the deed to her is made out jointly to the husband and wife, such deed gives him no interest except curtesy on her death, *Harrington v. Rawls*, 136 N. C. 65, 48 S. C. 571.

Where land is occupied by a husband and wife the presumption is that it is in the husband's possession, *Drinkwater v. Crist*, (Ark. 1907), 103 S. W. 733.

Sec. 254. Estate by entirety. It was held that where a husband and wife hold an estate as an entirety "neither . . . has an interest in the property to the exclusion of the other. Each owns the whole while both live, and at the death of either the other continues to own the whole, freed from the claim of any one claiming under or through the deceased." The Missouri married woman's statute Rev. St. 1890, section 4340 does not apply to an estate by the entirety, *Frost v. Frost* 200 Mo. 474, 98 S. W. 527.

Creation. A deed of real estate to a husband and wife jointly creates in them an estate in entirety, and the survivor

takes the whole fee, *Naler v. Ballew*, 81 Ark. 328, 99 S. W. 72. A quitclaim deed to husband and wife, as such, amounting to a release of a mortgage, operates to merge the legal title and equity of redemption in the husband and does not give husband and wife an estate by entireties, *Haak Lumber Co. v. Crothers* 146, Mich. 575, 109 N. W. 1066. A deed to the husband and wife "and their heirs" including the children of a former husband granted an estate by the entireties to the husband and wife with right of survivorship, and an equal share to each of the children by both marriages. The term "and their heirs" was void as surplusage when applying to living people. *Darden v. Timberlake*, 139 N. C. 181, 51 S. E. 895. Where a note and mortgage run to husband and wife they become tenants by the entirety and the surviving widow can collect it as against her deceased husband's executor, as Massachusetts St. 1885, c. 237, making conveyances to husband and wife create an estate in common is not applicable to mortgages, *Boland v. McKowen*, 189 Mass. 563, 76 N. E. 206.

Conveyance of. Where a deed of trust by the husband and wife is executed jointly for the benefit of creditors conveying "all and singular the real and personal estate wherever situated and all other property of every nature, kind and description wheresoever situate," their joint property is conveyed as well as the individual property of the wife, *Roberts v. Roberts*, 102 Md. 131, 62 Atl. 161. A husband and wife owned land by the entireties and the husband conveyed what he describes as his individual half interest to his wife after a judgment was obtained against him. The acceptance of this deed did not make the property subject to the judgment against the husband after his death as his wife being the survivor took the land free from all her husband's debts, *Hetzel v. Lincoln*, 216 Pa. 60, 64 Atl. 866.

Descent—Election. Where husband and wife own land as tenants by the entirety it passes on the husband's death to the surviving wife regardless of his will, but where he by his will devises her a life estate only in this and other property stating therein that such gift is in lieu of her interest under the law, she, by failing to file a repudiation of the will and later conveying such land, elected thereby to take under the will and she, and also her grantee, is estopped to claim an interest therein as surviving tenant by the entirety, *Young v. Biehl*, 166 Ind. 357, 77 N. E. 406.

A husband mortgaged a tract of land in which he and his wife were tenants by entireties without his wife's consent and the mortgage was subsequently foreclosed. The court decided that the husband and wife were estopped from interfering with the possession of the land during the husband's life, but the grantee did not possess the right to cut timber, *Bynum v. Wicker*, 141 N. C. 95, 53 S. E. 478.

When a husband who was joint tenant with his wife by entireties murdered her he became vested of the entire estate under the conveyance and not by inheritance from or through the wife. The common law rule, therefore, that a man cannot inherit land from one whose death is caused by his own felony, does not apply. Neither does Tennessee Acts 1895, p. 22, c. 11. *Beddingfiels v. Estill*, (Tenn. 1907) 100 S. W. 108.

Right of action. When land has been conveyed to the husband and wife jointly so they hold by entireties, the husband alone may maintain action for damage to the land by fire, *West v. Aberdeen & R. R. Co.*, 140 N. C. 620, 53 S. E. 477.

Sec. 255. Wife's separate property—What is—Liability of. For definition of separate property and power to convey see N. Mex. Acts 1907 Ch. 37 Sec. 8 & 9. Property acquired by the wife with money paid her by her husband as county sheriff, for the board of prisoners, is her separate property and may not be taken by his creditors, *Bodkin v. Kerr*, 97 Minn. 301, 107 N. W. 137. The separate estate of a married woman is primarily liable for funeral expenses, where the undertaker relied solely upon it for payment, *Schneider v. Brier's Estate*, 129 Wis. 446, 109 N. W. 99. In Kentucky a married woman does not charge her separate estate by signing a note unless the express provisions of the statute are followed, and where she mistakenly thought her separate estate liable and conveyed it to a creditor she can have the conveyance set aside because made under mistake, *Bowron v. Curd*, (Ky. 1905) 88 S. W. 1106.

Wife's property exempt from husband's debts. Under Code Sec. 3165 a wife's property is not liable for feed for a horse used exclusively by her husband in his business and a cow whose milk was partly used by the family and partly sold, *Martin Bros. v. Vertres*, 130 Ia. 175, 106 N. W. 516. *Ballinger Ann. Codes & St. s. 4502* was construed to render

barley free from attachment by the creditors of the husband when it was grown on land held as the separate property of the wife. *Hester v. Stine*, (Wash. 1907), 90 Pac. 594. When a married woman executed a mortgage upon her separate estate in return for the transfer to her of her husband's note she did not become a surety for him but a principal debtor, and the mortgage was therefore valid, *Sample v. Guyer*, (Ala. 1904) 42 So. 106. When a married woman transfers her bond for title to her husband upon the consideration that he pay a certain debt, the conveyance is invalid unless an order of the superior court allows it, *Webb v. Harris*, 124 Ga. 723, 53 S. E. 247. Missouri Rev. St. 1899, s. 4340, which provides that land bought with the separate funds of a married woman becomes her property not subject to her husband's creditors gives her an equity superior to such creditors in the absence of fraud or estoppel even where the legal title is conveyed to both husband and wife, *Hudson v. Wright*, (Mo. 1907), 103 S. W. 8. Montana Civ. Code, §227 relating to the exemption of the wife's property from liability for her husband's debts, was construed to render notes given by the husband for oil stock without right of enforcement against the separate estate of the wife, *Mantle v. Dabney*, 44 Wash. 193, 87 Pac. 122. The Act of March 9, 1903, (Sess. Laws 1903, p. 345) was construed to release a wife from liability on a note executed as surety for her husband, as she could not bind herself to pay a debt that was not contracted for her own use or affecting her separate property, *Bank of Commerce v. Baldwin*, 12 Idaho 202, 85 Pac. 497. Where a married woman, to secure an extension of her husband's indebtedness for beer delivered to him, made an affidavit that she had herself received the beer and considered herself as the real debtor and signed a note secured by a mortgage on her own separate property to secure the debt, she was not estopped to prove that in fact she was only a surety for her husband and that the mortgage, therefore, was void, upon showing that the creditor knew all the facts and could not have been deceived by her acts, *Indianapolis Brewing Co. v. Behnke*, (Ind. 1907), 81 N. E. 119. Real estate which is the wife's separate property cannot be taken on execution by a judgment creditor of the husband, although standing in the husband's name, where the creditor is a purchaser of a note which matured and was dishonored long before the real estate was con-

veyed to the husband. The payee of the note did not rely on the husband's ownership of that real estate when he gave him credit, and the purchaser, taking the note after it was dishonored, could have no greater rights than the payee, *Moore v. Rawlings*, (Iowa 1908), 114 N. W. 1040.

Sec. 256. Conveyances and agreements between husband and wife—Gift—Ante-nuptial agreement. Under Alabama Code 1896, section 2520 providing that all property to which a wife may become entitled after her marriage shall be her separate property a voluntary deed by a husband to his wife executed before the passage of the statute passed the legal title to her as between the parties, *Milam v. Coley*, 144 Ala. 535, 39 S. 511. Kentucky Statutes 1903, section 2128 as to transfers between husband and wife, construed, *Eberhardt v. Wahl's Admr.*, (Ky. 1907), 98 S. W. 994. Husband and wife may convey to each other. Minn. Laws 1907 Ch. 123. Amending Sec. 3335 Rev. Laws 1905. When a wife deeded a piece of real estate to her husband, and the husband did not join in the deed, it passed no legal or equitable interest, when it was executed while the husband and wife were living together, *Smith v. Vineyard*, 58 W. Va. 98, 51 S. E. 871. Where a husband takes advantage of the confidence his wife reposes in him and induces her to sign a deed to him without having consulted an attorney of her own and without consideration, the deed is void, and may be set aside after her husband's death, although he has recorded a deed to his children by his first wife. *Yordi v. Yordi*, (Cal. 1907), 91 Pac. 348.

Conveyance through third party. When a husband deeds property voluntarily through another person to his wife, he cannot have the deed revoked because of improvidence, etc., but it can be revoked only if the grantor did not have sufficient mental capacity to execute the deed, and his wife's promise to will it to him is a mere parol promise and void under the statute of frauds. *Fretz v. Roth*. 68 N. J. Eq. 516, 64 Atl. 152. Where a wife took an absolute title to property by a deed from her husband through a third party, the presumption was that an absolute conveyance was intended when the wife assumed all debts on the property, although she left her husband to manage it, especially when the wife's heirs produced letters from the husband to the wife saying that "the property is all yours," *Wilson v. Terry*. 70 N. J. Eq. 231, 62 Atl. 310.

Contracts. Husband wife may contract with each other. N. Mex. Acts 1907 Ch. 37 Sec. 4. In Kentucky a husband may waive his marital rights in his wife's estate and settle it upon her separate use, and an agreement to this effect will be upheld in equity without the intervention of a trustee, Bohannon v. Bohannon's Admx., (Ky. 1906), 92 S. W. 597. In Missouri a husband and wife during coverture have the full power and authority under the statutes, as to their property rights, to contract with each other and such contract will be enforced at law just as if each had contracted with a third person. O'Day v. Meadows, 194, Mo. 588, 92 S. W. 637. A husband and wife made a parol agreement that the wife should convey a part of her farm to her husband, and that he in consideration therefor should join with the wife in a conveyance of the balance to her children. The land was conveyed to the husband through a third party and the children took possession of the part of the farm which was to be conveyed to them. The wife was then entitled to a bill for specific performance when her husband refused to perform his part of the agreement and the statute of frauds did not apply. Kittredge v. Kittredge, 79 Vt. 337, 64 Atl. 89.

Contracts of separation between husband and wife providing for a division of their real estate when free from fraud and overreaching on the part of the husband, and when fairly made and understandingly entered into, will be upheld in Kentucky, Branch v. Branch's Exr., (Ky. 1907), 98 S. W. 1004.

An ante-nuptial agreement which provided "that all property which either party may at present own . . . or may hereafter acquire shall go to the survivor hereto, to be held by him or her for life, and after the death of the last survivor of them . . . shall go and vest in and to the children of" the man "in fee simple" went into effect upon the death of the husband leaving his wife surviving him and nothing passed under his will, Collins v. Bauman, (Ky. 1907), 102 S. W. 815. Where a woman entered into an ante-nuptial agreement with the testator upon the mistaken belief that the marriage would not revoke his will in the absence of any fraud practiced upon her she cannot avoid the agreement, Robbins v. Robbins, 225 Ill. 333, 80 N. E. 326. An ante-nuptial agreement whereby each party releases and conveys to the other all interest in the other's property, and renounces all claims in law or equity of curtesy, dower, homestead, survivorship, or otherwise, con-

stitutes a release of a widow's award provided there are no minor children of the husband living with her at his death, *Kroell v. Kroell*, 219 Ill. 105, 76 N. E. 63. An ante-nuptial agreement whereby the intended wife released all her interest in her intended husband's property in case she survived him, except homestead and dower and was to receive therefor \$1500. in cash from his estate within 60 days of his death, was disproportionate to his means when he had \$10,000 worth of personalty and a life estate in land worth \$4000 per year. The presumption making the agreement void upon that account was not overcome by the fact that the parties had lived near each other for many years and were well acquainted, that the intended husband was reputed to be wealthy and the intended wife's son-in-law knew his financial standing, *Murdock v. Murdock*, 219 Ill. 123, 76 N. E. 57. An ante-nuptial contract made in Germany provided that "the surviving spouse shall be the sole heir of the predeceased spouse" and after the husband's death in Germany the court granted specific performance of the contract for the widow regarding land which the husband had subsequently bought in New Jersey, *Kleb v. Kleb*, 70 N. J. Eq. 305, 62 Atl. 396.

Gift. Where a plural wife occupied a house for 46 years and made no protest to the distribution of the estate in which she had a share under her husband's will, she had no right to claim that the house had been given to her, when her husband had always paid the taxes on it and exercised other acts of ownership over it. As she was a plural wife she had no right of dower. *Raleigh v. Wells. Mutual Inv. Co. v. Raleigh*, 29 Utah 217, 81 Pac. 908.

Repaying debt existing between them. A wife who uses her earnings to pay for a threshing machine for her husband may retain, as against his other creditors, property conveyed to her by him in repayment, *Aultman Engine & Thresher Co. v. Greenlee* 134, Ia. 368, 111 N. W. 1007. A husband who receives money from his wife, at the time of their marriage, promising orally to repay her, may in spite of creditors who have acquired claims against him in the meantime, subsequently convey to her real estate in settlement of her claim, *Mahaska County v. Whitsel*, 133 Ia. 335, 110 N. W. 614.

Sec. 257. Effect of divorce on real property rights.
Property owned by the husband and wife as community prop-

erty, which had been conveyed to them jointly, became common property after divorce when the divorce court did not otherwise dispose of the property, and the husband and wife held it as tenants in common. *Ambrose v. Moore*, (Wash. 1907), 90 Pac. 588. When a husband and wife in settlement of a suit for divorce agree to divide equally a tract of land and the division is made the wife cannot as against the husband or his vendees claim any interest whatever, by reason of the original conveyance under which the husband held, in the one half taken under the division by him. *Rash v. Hart*, (Ky. 1905), 89 S. W. 192. A beneficiary under a will which provided that a trustee convey to her if she "should survive her present husband" upon obtaining a divorce from him was entitled to a conveyance, *Cary v. Slead*, 220 Ill. 508, 77 N. E. 234. Where an engaged man conveyed land to his daughter by a former wife and after his second marriage his wife sued him for separate maintenance claiming that the land was held in trust for her husband, and in settlement of such suit a quitclaim was executed by the wife and her husband to his daughter in pursuance of an agreement whereby upon the death of the husband the daughter should pay his widow a certain sum, the payment of the money was not a condition precedent to the vesting of the title in the daughter, *Mackey v. Kerwin*, 222 Ill. 371, 78 N. E. 817.

Under a statute providing that in case of a divorce granted to a wife because of the husband's imprisonment or adultery, she "shall be entitled to the same interest in his lands as if he were dead to be allowed in the same manner," the wife, upon such divorce, is entitled to immediate possession of his real estate, if there are no children living, *Glaser v. Kaiser*, (Minn. 1908) 114 N. W. 762.

Sec. 258. Rights in community property—Statutes. A donation of land in Louisiana, made specially and separately to a wife, does not fall into the community, *Hurst v. Thompson & Co*, 118 La. 57, 42 S. 645.

When the community is dissolved by the death of the wife its creditors may go against its property in the possession of the husband and if insolvent the heirs of the wife cannot object because they were not made parties to a suit in the Federal Court to have a plantation owned by it sold to pay the purchase money due thereon. The purchaser at such sale, the

plantation having been seized, appraised, advertised, offered and adjudicated as a whole gets title as an entirety in spite of the recital in the marshal's deed that the property sold was "All the rights, titles, interests, and claim" of the defendant, the husband, *Luria v. Cote Blanche Co.*, 114 La. 385, 38 S. 279. A widow in community and testatrix who is administering a succession may bring ejectment against an alleged lessee from property inventoried as belonging to that succession and as having belonged to the community in which she had been a partner, and the action may be brought in a justice's court when the monthly or yearly rental, or the rent of the unexpired term of the lease does not exceed \$50. The jurisdiction of the justice is not affected by an injunction issued by the district court against the plaintiff disturbing the defendant's possession, *Campbell v. Hart*, 118 La. 871, 43 S. 533. Where the testator has provided in his will that he "has undertaken to dispose of all of his separate estate and one half of the community property," he did not die intestate as to the other half of the community property when his wife died after the execution of the will and before his death, but the will was construed as a whole to include the remaining half of the community property, *Lux's Estate, in re*, 149 Cal. 200, 85 Pac. 147.

The succession to and distribution of separate and community property of intestates is regulated by Id. Laws 1907 Ho. Bill No. 75, amending Rev. Stat. 1887 Ch. 14 Tit. 10 Sec. 5702. Community property, on death of either husband or wife, is regulated by Idaho Ho. Bill No. 135, amending Rev. Stat. Sec. 5713. The conveyance of community property by married women, the period of limitation for actions relating thereto and its liability for contracts of the wife are regulated by N. Mex. Acts 1907 Ch. 37 Sec. 10 & 11. Texas Revised Statutes 1895 arts. 1697 and 2225 as to the rights of a surviving husband and children in community property, construed, *Belt v. Cetti*, (Tex. 1906), 93 S. W. 1000.

IMPROVEMENTS

While mortgagee is in possession, see *post* §411.

Estoppel by allowing improvements to be made, see *ante* §154.

Recovery for improvements by defendant in ejectment, see *ante* §§113-117.

Improvements as satisfying the statute of frauds, see *post* §511.

Sec. 259. What occupiers are entitled to reimbursement for improvements—Occupying claimant.

Rights of one making improvements while holding under a void tax sale see *post* §552.

Where a deed absolute in form is declared a mortgage the court may in its discretion refuse to allow the grantee anything for valuable improvements made while a trespasser, *Shelley v. Cody*, 187 N. Y. 166, 79 N. E. 994.

When a landowner settled his daughter and her husband on the land and the latter put thereon improvements with his co-operation and upon the understanding that they were to have a deed thereof they were entitled to a lien for the value of the improvements, if the father failed to give them a deed, *Burk's Admr. v. Lane Lumber Co.*, (Ky. 1905), 89 S. W. 686.

A tenant in possession under a verbal contract for a five years' lease has an equity for any outlay or valuable improvement he has made because of the tenancy, *Poole v. Johnson*, (Ky. 1907) 101 S. W. 955. The right of a tenant to receive payment from a landlord for improvements placed on the demised premises during the term arises from no right or duty from the relation of landlord and tenant, but is always a matter of express contract, and the tenant only has such rights as are given him by his contract, *Diederich v. Rose*, 228 Ill. 610, 81 N. E. 1140.

A husband who during the marriage expends some of his own funds in placing improvements upon his wife's separate estate but who is left her entire estate by her will has no claim for the amount to which his money has enhanced it in value, although the wife's forced heir succeeds in getting the husband's legacy reduced to one third, *Succession of Barrow*, 118 La. 1031, 43 S. 667.

Improvements made by a purchaser at a void partition sale prior to its confirmation cannot be credited to him under the provisions of section 2754, *Cowling v. Nelson*, 76 Ark. 146, 88 S. W. 913.

Occupying claimant. The Illinois occupying claimant's act providing for allowances to occupants for improvements made in certain cases, construed, *Wakefield v. Van Tassell*, 218 Ill. 572, 75 N. E. 1058. In order to entitle a person in equity to compensation for improvements made upon the land of another he must have held possession under color of title, in good faith and adversely to the true owner, *Bryan v. Coucliman*, (Md. 1907), 67 Atl. 279. The "Occupying Claimant's Act," Laws 1883 c. 59, protecting persons not in possession of land who pay taxes thereon and derive title from the state or the United States, construed, *Flanagan v. Mathisen*, (Neb. 1907) 110 N. W. 1012. Where a statute provides that a claimant in occupation of land cannot be deprived of possession without being paid for improvements made by himself and by his grantor who held under the same title, such claimant cannot recover the value, or any part of the value, of those improvements, in an action for damages for breach of covenant of warranty, and where the cloud on the title is only the existence of a part interest, the true measure of damages is the value of that interest, *Webb v. Wheeler*, (Neb. 1908) 114 N. W. 636. When the defendants in an action of ejectment have a right to payment for improvements on the real estate, the plaintiff may either sell the land to the defendants or if they refuse to pay its value after a tender of a warranty deed, the owner may have the value of the land adjudged a first lien and have the property sold to satisfy the said lien, *Bruner v. Hunt*, 71 Kan. 533, 81 Pac. 194.

Sec. 260. Value of improvements. As improvements erected by a grantee under a deed afterwards cancelled were not equal in value to the fair rental of the property the grantee was not allowed a lien for their cost, *Alvey v. Alvey* (Ky. 1906) 97 S. W. 1106.

Value and not cost. A son, the grantee in an undelivered deed from his father, who went into possession of the premises, borrowed money from his father and spent it upon improvements on the land is not entitled in partition proceedings brought by his brothers and sisters after his father's death to

have the notes cancelled to the extent of the amount expended in improvements, but only to the value of the improvements irrespective of their cost, *Noble v. Tipton*, 219 Ill., 182, 76 N. E. 151.

Sec. 261. Estoppel.

Estoppel against one allowing improvements to be made, see *ante* §154.

Improvements made upon property occupied by a son through sufferance for 30 years, after notice by his father that the land so improved would not be given to him do not entitle the son to compensation, *Holsberry v. Harris*, 56 W. Va. 320 49 S. E. 404. Where one of three trustees under a will with power to sell, sold a tract and all three allowed the buyer to occupy from year to year, make valuable improvements, and make certain payments from year to year, the sale might be held to have been ratified although they accepted the money as rent and had no actual knowledge of the buyer's claim, (2 judges dissent), *Hill v. Peoples*, 80 Ark. 15, 95 S. W. 990. Where the plaintiff, an old woman and the sole devisee of her husband's will, was induced by her son-in-law, a young lawyer, to renounce its terms and claim her statutory rights by fraudulently persuading her that the will was void on account of the testator's mental unsoundness, and later the son-in-law bought two thirds of the land at an administrator's sale to pay debts and then the plaintiff conveyed the other third to him in return for his agreement to support her for life, in a suit to set aside her election and take under the will the fact that the son-in-law had in reliance upon these conveyances spent about \$2000 in improvements upon the property did not stop the plaintiff from maintaining her action, *White-sell v. Strickler*, 167 Ind. 602, 78 N. E. 845.

Sec. 262. Statute not retroactive. Sess. Laws 1903, p. 262, c. 137, which provides that one who builds permanent improvements on real estate in good faith and with color of title, shall be allowed the value of the improvements, was construed not to apply to cases arising before the passage of the law, and one who built them had no right to a counter-claim for improvements. *Investment Co. v. Hambach*, 37 Wash. 629, 80 Pac. 190.

INFANTS AND INSANE PERSONS

Minor's interests in partition, see *post* §446.

Sec. 263. Validity of contracts and conveyances.

Insane person. The procedure necessary for the conveyance of the interest of an insane husband or wife in the real estate of the spouse is set out in Neb. Laws 1907 Ch. 99. The grantees in a deed executed by an insane person cannot hold the land as against his committee where it appeared that they had known him from infancy and his defective condition of mind was a matter of common knowledge to all in the community, *Rush v. Handley*, (Ky. 1906), 97 S. W. 726. A mortgage executed by a lunatic for a past consideration is invalid, *Smith's Committee v. Forsythe*, (Ky. 1906), 90 S. W. 1075. A contract made by an insane person and fulfilled in a perfunctory manner by his guardian, who conveys the property for less than its value, is invalid, and the proceeds of the sale, by the purchaser to a third person, will be held in trust by the former for the original grantor, *De Vries v. Crofoot*, 148 Mich. 183, 111 N. W. 775. For an extensive examination of evidence showing that a person, though of unsound mind on some subjects, sufficiently understood the force and effect of a transaction of purchase of land by him to bar his right to a rescission of it, see *Ratliff v. Baltzer's Adm'r*, (Idaho 1907) 89 Pac. 71. Where plaintiffs sought to have a deed executed by a grantor, 85 years of age, cancelled and set aside, on the ground that she did not have at the time of executing the same, sufficient mental capacity to understand the force and effect of her act, the evidence showed that the grantor after an attack of the grippe had times when "her mind would waver" but habitual insanity was not proven. The burden was upon the plaintiffs to show that the aged grantor was mentally incapable of executing the deed. *Hudson v. Hudson*, 144 N. C. 449, 57 S. E. 162. In a suit by grantor and after her death by her husband and heirs, to recover land from the heirs of the grantee on the ground of the insanity of the grantor, the presumption prevailed, that in the interim between release and recommitment to an asylum for the insane, during which period the grantor signed the deed of conveyance, the grantor was lucid and capable of making a valid contract, *McPeck's Heirs v. Graham's Heirs*, 56 W. Va. 200, 49 S. E. 125.

Minor. Growing timber belonging to a minor is real estate and can only be sold in Kentucky by the minor's guardian in accordance with a decree of court. A sale by a pretended guardian is void as against the minor although the pretender later became guardian. A subsequent suit of the guardian against the purchasers constitutes a sufficient disaffirmance of the sale, *Ayer & Lord Tie Co. v. Witherspoon, Admr.* (Ky. 1907), 100 S. W. 259. When the Kentucky Statutes authorized a guardian of a minor to lease his real estate for not exceeding seven years during minority, a grant of an easement to a pipe line to lay pipes made by the guardian was construed as such a lease. Upon coming of age the ward could only recover damages for the further maintenance thereof. *Cumberland Pipe Line Co. v. Howard*, (Ky. 1907), 100 S. W. 270.

A deed to a minor is not void but merely voidable at the instance of the minor himself and strangers to such a conveyance who claim under a title adverse to that of the minor cannot claim that the infant did not receive an adequate consideration and that the conveyance was therefore void, *Shaffer v. Detie*, 191 Mo. 377, 90 S. W. 131. Where an insane purchaser of land pays the purchase money and orders the deed made to one of his children the grantee holds in trust for the purchaser and for his heirs after his decease. *Couch v. Harp*, 201 Mo. 457, 100 S. W. 9. An infant grantee in a beneficial deed need take no positive action to accept it as acceptance is implied, *Akers v. Shoemaker* (Ky. 1907) 102 S. W. 842.

Sec. 264. Affirmance and disaffirmance. An infant who contracts for the construction of a house and gives a deed of trust to secure the payment of the price therefor can have cancellation and a return of the money she has paid minus compensation to the contractors for his expenses already incurred in performing the contract, *Thornton v. Holland*, 87 Miss. 470, 40 S. 19. Under a deed executed by a married woman, a minor, in 1871, disaffirmed in 1894 through a deed to her daughter who was married and a minor till 1898, it was held that Acts 1899 p. 209 c. 78 did not bar the daughter from action for recovery. *Gaskins v. Allen*, 137 N. C. 246, 49 S. E. 919.

An infant made a warranty deed, and when he did not disaffirm it within a reasonable time after coming of age, the

whole deed was binding on him including the warranty clause, therefore he was estopped from setting up a title to the land which he afterwards acquired. *Weeks v. Wilkins*, 139 N. C. 215, 51 S. E. 909. When a grantor who was an infant at the time of his conveyance after he came of age accepted the remainder of the purchase money for the land he thereby ratified the sale and this act related back to the date of the conveyance and made it as perfect and complete as though he had been of age when it was made. His subsequent conveyance to another person therefore was absolutely void, *Damron v. Ratliff*, (Ky. 1906) 97 S. W. 401. In an action by a grantor to set aside a conveyance because of minority where it appeared that the grantor, who was illiterate and ignorant of his exact age, was induced by the grantee to make an affidavit that he was over 21 years of age when as a matter of fact he was not, it was held that as the grantee could not have been deceived by the affidavit which he knew was false there was no objection on the ground of fraud to permitting the grantor to disaffirm his conveyance, *Race v. Cawood*, (Ky. 1906), 97 S. W. 412.

Sec. 265. Sales under judicial control. Sec. 2348, 2351, 2352, 2355, 2358, 2359 & 2361 of the Code providing for the sale of lands of infants, &c., are amended by N. Y. Laws 1907, Ch. 49. Guardians for insane persons are provided for and authorized to convey the real estate of their wards by Pa. Laws 1907 No. 222. Proceedings to be taken on application for sale of land of infant or incompetent are specified by Wis. Laws 1907 Ch. 660. The remedy of an infant whose land is sold although he had no guardian and the court appointed no guardian adlitem, is by appeal not by an action to set aside the sale after coming of age. *Davidson v. Marcum*, (Ky. 1905), 189 S. W. 703. A Missouri Circuit Court has no authority as a court of general equity jurisdiction to decree the sale of infant's land in order that the proceeds may be invested in land. *Heady v. Crouse*, (Mo. 1907) 100 S. W. 1052. Under C. 83, code of 1899, when a sale of an infants' land, duly confirmed by the court, has been made upon a written proposition for purchase, decrees extending the time of removing the timber were void, when they were based on mere oral representations alone and not upon pleadings in writing. *Lilly v. Claypool*, 59 W. Va. 130, 53 S. E. 22.

A court of equity was of opinion that the execution of a 99 year lease of land in which infants were interested by which the net annual rental was increased from \$900. to \$1500. and which provided for the readjustment every 20 years was clearly for the best interests of the infants and accordingly decreed its execution, *Ricardi v. Gaboury*, 115 Tenn. 484, 899 S. W. 98. The daughters of a decedent and their husbands entered into an agreement for the sale of the home estate for the purpose of paying the debts of the estate, thereby leaving the personal property unincumbered. In a petition to the court the children and their husbands, the infant children being represented by their next friend, joined in a prayer for such sale and were properly before the courts, said court having jurisdiction, *State ex rel. Little v. Little*, (N. C. 1906), 54 S. E. 445.

Sec. 266. Guardian's acts in general. Where a guardian makes a valid sale of land under the order of the court under Comp. Laws, (N. Mexico) 1897, ss. 2052, 2053, and the order for the sale of the lands was duly entered without appeal, no attack collaterally may be made upon it by a civil action for ejectment, *Hagerman v. Meeks*, (N. M. 1906) 86 Pac. 801. A guardian de jure having no right to receive funds arising from the sale of his ward's real estate cannot be held liable for it as guardian defacto. *Pope v. Prince's Adm'r.* 105 Va. 209, 52 S. E. 1009.

If a guardian expends his own money in improving the estate of his ward, the measure of compensation he should be allowed is not the amount expended but the increase in value due to it, and the ordinary increase in value of the real estate should not be counted. For unusual development of land by drainage, fertilization, etc., allowance should be made, but should not be made for ordinary good husbandry, *Bramlett v. Mathis*, 71 S. C. 123, 50 S. E. 644.

A guardian appointed by the court for a minor child assumed the duties of trustee under the will of the mother, but his acts in selling the real estate and apply the funds therefrom to the use of the child were not void but only voidable, and the heirs had a right to redeem the real estate sold by the guardian or else allow the sale to stand, and the purchasers were entitled to a return of the purchase price paid as well as compensation for improvements, *Cutter v. Burroughs*, 100 Me. 379, 61 Atl. 767.

INSURANCE

Sec. 267. Title insurance. A title insurance company examined a title derived by will and agreeing with the insured that he had a title to the entire property, the company issued to him a policy. When a court subsequently decided that he only had a half interest in the property, the insurance company could not claim that he had suffered no damage, but he could recover for the loss of the half interest. *Foehrenbach v. G. A. T. & T. Co.* (Pa. 1907), 66Atl. 561.

Sec. 268. Issue—Renewal—Oral agreement—Misrepresentations—Agents' liability.

Issue. Where, there being no oral agreement for insurance to take effect prior to the issue of the policy, upon an application for insurance at less than the regular rate, an agent wrote up and countersigned a policy, held it and wrote the applicant that he had "issued" a policy but would hold it until he should have time to hear from his company, and the company later rejected the risk and the agent sent the policy to it, there was no contract of insurance, although the applicant may not have been notified of the company's refusal, *Hartford Fire Ins. Co. v. Whitman*, 75 Ohio 312, 79 N. E. 459. A fire insurance agent made out a binder binding his principal, an insurance company for insurance in the sum of \$2,500 and his principal wrote him that he preferred he should reduce the amount \$1500., and then the agent executed a binder for the \$1,000 on another company but failed to inform the new company or the insured that he had done so, but wrote to the insurance company that requested the reduction that he had reduced their binder to \$1,500. The insurance company was still liable for the full amount of the policy, but it had a right to sue the agent for his negligence in not notifying the insured that his policy was canceled when such notification under the conditions of the standard policy of New York to which the binder referred would have relieved the insurance company from liability as the fire did not occur for nine days after the notification was received by the agent and five days' notice was sufficient. *British American Ins. Co. v. Wilson*, 77 Conn. 559, 60 Atl. 293.

Renewal. When the insured only a few hours before his

policy expired reminded the Company's agent that it would expire at noon of that day and requested its renewal, and the latter promised to renew it, the insured, in the absence of a notice to the contrary, had the right to understand that he was to be charged with the premium and would be required to pay it on demand, and a contract for renewal was completed, binding on both parties, *German Ins. Co. v. Goodfriend*, (Ky. 1906) 97 S. W. 1098. An insurance agent agreed to renew a policy and keep a storehouse insured, accepting the regular premium on the policy. The plaintiff after a loss told him he would hold him liable personally, and the agent admitted his liability as there was no insurance on the building owing to his negligence. Then, after a judgment against the agent, the plaintiff cannot proceed against an insurance company for whom the defendant had formerly been the agent as the plaintiff had elected to proceed against the agent. *Rounsaville v. N. C. H. Fire Ins. Co.*, 138 N. C. 191, 50 S. E. 619.

Oral agreement. In Missouri under Missouri Revised Statutes 1899 section 974 an insurance company by its agent may enter into a valid oral contract of insurance, *King v. Phoenix Ins. Co.*, 195 Mo. 290, 92 S. W. 892.

Misrepresentations. Where an owner insured a frame building used as a store on one policy, and then took out another policy on grain and meat stored in the building, the policy on the store was not invalidated by false swearing regarding the amount of corn, etc., covered by the second policy, although the second policy was invalidated thereby, *Williams v. Virginia State Ins. Co.*, 106 Va. 259, 55 S. E. 680. If the insured knowingly includes an article in his statement of loss to the insurance company which was not burned, or if the insured knowingly put a false and excessive valuation on the whole so as to display a reckless and dishonest disregard for the truth, the policy is void and the loss cannot be recovered, especially when the house had been stripped of all its furnishings which were the most valuable just before a very suspicious fire, *Rovinsky v. Northern Assur. Co.* Same v. *Fire Ins. Co. of County of Philadelphia*, 100 Me. 112, 60 Atl. 1025. Where a fire policy insured for a specified sum a house and also for a specified sum certain goods within it, and provided that the "entire policy" should be void if the insured misrepresented his interest in the property, and the insured, whose house was situated on unsurveyed government

land, declared falsely that he owned the fee, the policy was forfeited as to the goods in the house, as well as to the house; and the fact that the premium was entire and that the policy declared the "entire" policy void were not necessary for such decision. *Goohberg v. Western Assur. Co.*, 150 Cal. 510, 89 Pac. 130.

An application for fire insurance which describes the property as a "combined rooming and frame dwelling house" of 24 rooms is not a representation that the building is an ordinary dwelling house. *Arkansas Fire Ins. Co. v. Claiborne*, 82 Ark. 150, 100 S. W. 751. "When an applicant for insurance has answered truthfully all the questions submitted to him and has not suppressed any fact within his knowledge tending to enhance the risks, he has performed all that is required of him. If more information is necessary to a full understanding of that risk, it is the duty of the insurer to seek it, or at least ask for it." *Roloff v. Farmers' Home Mut. Ins. Co.*, 130 Wis. 402, 110 N. W. 261.

Estoppel. Where the company's agent makes out the insurance policy and writes in answers which he knows are untrue or are not made by the insured, and the latter signs the application in ignorance thereof, the company is estopped to claim misrepresentations which invalidate the policy, *Gardner v. Continental Ins. Co.*, 31 Ky. Law Rep. 89, 101 S. W. 908.

Sec. 269. Insurable interest—To whom policy payable. A buyer under a contract of purchase who has paid part of the price and gone into possession has an insurable interest, *Zenor v. Hayes*, 228 Ill. 626, 81 N. E. 1144. A builder who had contracted to take down an old building and furnish a new complete one had an insurable interest in the building although he had already received all but \$10. of the contract price, because if the building were destroyed he was obliged to rebuild it and would receive therefor no more than the sum stated in the original contract, *King v. Phoenix Ins. Co.*, 195 Mo. 290, 92 S. W. 892. When the loss on a fire insurance policy is payable to A as his interest may appear, and it is taken out in the name of B, an action may be sustained by B. *Staats v. Georgia Home Ins. Co.*, 57 W. Va. 571, 50 S. E. 815.

Sec. 270. Rights of mortgagor and mortgagee—Sub-

rogation of insurance company. Where the mortgagee after the insurance had been assigned to him agreed to place it in the future himself and in so doing insured the wrong property, upon a loss by fire he was liable in assumpsit to the mortgagor, *Boyce v. Union D. P. Loan Assn.*, (Penn. 1907) 67 Atl. 766. Maine Rev. St. c. 49, section 54, requiring a mortgagee when the property is burned to notify the insurance company in order to acquire a lien thereon, construed, *Knowlton v. Black*, 102 Me. 503, 67 Atl. 563. Where an insurance policy was payable to a trustee in a deed of trust, and the deed was foreclosed and the property sold to the complainant in the foreclosure suit for an amount which left a deficiency and later the building on the premises burned, the insured, during the period of redemption was entitled to the proceeds of the policy, *Rawson v. Bethesda Baptist Church*, 221 Ill. 216, 77 N. E. 560.

Action by mortgagee. Civ. Code 2541 was construed as permitting a recovery of insurance by the mortgagee under a policy making "the loss if any payable to the mortgagee as his interest should appear," although the ownership of the property had changed without the consent of the insurer contrary to one of the conditions of the policy, *Welch v. British Am. Assur. Co.*, 148 Cal. 223, 82 Pac. 964. Where a mortgagee required the mortgagor to insure the property for the benefit of the mortgagee the latter may recover in case of fire upon such a policy payable to it "as interest may appear," although the mortgagee never heard of the policy until after the fire, regardless of who held possession of it. A later conveyance of the equity of redemption by the mortgagor is also immaterial. The mortgagor having disappeared the mortgagee may recover if it furnish to the company in writing, within a reasonable time, proper information in regard to the loss, as to such matters as a mortgagee reasonably may be expected to know. The mortgagee was not, however, bound by the provisions in the policy for the giving of a sworn statement signed by the mortgagee himself, *Union Inst. &c. v. Phoenix Ins. Co.* (Mass. 1907) 81 N. E. 994.

Subrogation of insurance company. In an action by an insurance company to enforce a mortgage by subrogation the evidence showed that the mortgage clause annexed to the policy was not asked or desired of the insured and that the policy in that respect should be reformed, *Gardner v. Conti-*

mental Ins. Co., 31 Ky. Law Rep. 89, 101 S. W. 908. Where a policy is forfeited by the mortgagor on account of a breach of its conditions by changing the ownership of the property without notifying the company, and the mortgagor besides does not notify the company of the loss, the policy is void as to the mortgagor, and the insurer after paying the mortgagee is entitled to be subrogated to his rights and to collect the full amount so paid from the land, *Gillespie v. Scottish U. & N. Ins. Co.*, 61 W. Va. 169, 56 S. E. 213. When an agreement has been made between the insured and the insurer regarding a loss by fire and the insured has accepted the award of appraisers made on an erroneous basis and signed a receipt in full for all loss by fire, the mortgagee is also bound by the settlement when the "union mortgage clause" that "no acts of anyone other than the mortgagee shall affect the mortgagee's right of recovery" is not incorporated into the policy. *Collinsville Sav. Soc. v. Boston Ins. Co.*, 77 Conn. 676, 60 Atl. 647. A cestui que trust insured a piece of real estate in the name of the owner to the amount of the interest of the cestui que trust in the property, but the owner, who did not know of the insurance, was liable for the full amount of the deed of trust, although a loss by fire occurred and the cestui que trust was paid the full amount of his interest. The insurance company could then recover from the owner as it was entitled to be subrogated to the rights of the cestui que trust. *Baker v. Monumental Savings & Loan Ass'n*, 58 W. Va. 408, 52 S. E. 403.

When a house is burned near a railroad and the insurance company in paying the loss obtains a receipt subrogating it to the rights of the insured for action against the railroad, the insurance company can maintain an action for the full amount of the insurance against the railroad for the loss if the railroad was responsible, and the insured need not be made a party to the suit, *Aetna Ins. Co. v. Charlestown & W. C. Ry. Co.*, 76 S. C. 101, 56 S. E. 788.

Sec. 271. Policy construed—Various conditions. A building used partly as a dwelling house and partly as a store is not a "dwelling-house" within a description in a fire insurance policy, *Bowditch v. Norwich Union Fire Ins. Society*, 193 Mass. 565, 79 N. E. 788. It was held that upon the evidence various clauses in a fire insurance policy, providing for

forfeiture by the company, had been waived. *Arkansas Ins. Co. v. Claiborne*, 82 Ark. 150, 100 S. W. 751.

Assignment. An insurance policy contained a provision making the written assignment of the policy subject to the consent of the insurer, but an assignee of the policy without such consent had a valid right to bring suit after a loss; and furthermore he was not bound by a settlement of the loss agreed upon between the insurer and the assignor, unless the assignor was the duly authorized agent of the assignee, *Georgia Co-op. Fire Ass'n v. Borchardt & Co.*, 123 Ga. 181, 51 S. E. 429.

Payment of premiums. When a fire occurred on January 24 and an insurance premium was due January 1 as the policy contained a clause suspending the insurance so long as a premium remained unpaid the insured could not recover for the loss, *McCullough v. Home Ins. Co.*, (Tenn. 1907) 100 S. W. 104.

Increase of risk. Under a provision in a fire policy that it shall be void if the risk is increased, unless otherwise provided by agreement endorsed thereon, and that no agent of the insurer shall have power to waive a provision in a policy except in writing endorsed thereon, there is no forfeiture, although the insured increased the risk by the operation of a smelter on the premises, with the permission of a general agent, for which a consideration was paid, where the agent in endorsing the agreement on the policy wrote "the within described smelter" and the smelter was not therein described. *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 89 Pac. 102.

Sec 272. Condition in policy of sole and unconditional ownership.

Breach. When the insured prior to the issuance of his policy has given a bond to convey the property to a third person, unless the policy contains a special agreement between the insurer and insured with regard to this the policy is void, because the insured's interest is "other than unconditional and sole ownership," *Insurance Co. v. Erickson*, 50 Fla. 419, 39 S. 495. When a policy contained a clause that it should be void "if the interest of the insured be other than unconditional or sole ownership" a parent insuring for his children a majority of whom were of age, could not recover for a loss,

when he took the policy in his own name and there was nothing to show that his children were the owners, *Fox. v. Queen Ins. Co. of Am.*, 124 Ga. 948, 53 S. E. 271. Where an insured has conveyed property by a deed absolute in form, the fire insurance policy is rendered void when the policy requires that the insured when taking out the policy shall state the location of the land, "by what title it is held if any other than a fee, and if any liens are thereon." Although the insured has a right to repurchase the property at a specified price this interest is different from that in the policy and renders it void. *Bennett v. Mutual Fire Ins. Co.*, 100 Md. 337, 60 Atl. 99.

No breach. A man in possession of land under a conveyance of title in fee simple subject to a vendor's lien for the balance of the purchase price is the sole and unconditional owner within the meaning of the insurance policy, *Insurance Co. of North America v. Pitts*, 88 Miss 587, 41 S. 5. An owner who has contracted to convey timber land and a saw-mill upon the performance of certain conditions by the other party is the "sole and unconditional owner" within the meaning of a fire insurance policy. The conditional's buyer's possession under the contract being for the purpose of cutting timber and manufacturing lumber his possession is as agent for the owner, *National Fire Ins. Co. v. Three States Lumber Co.*, 217 Ill. 115, 75 N. E. 450. An insurance policy contained a clause which rendered it invalid "if the subject of the insurance be a building on ground not owned by the insured in fee simple," but, when the land had been allotted to the insured under the homestead laws and the legal title was still in the government, the policy was not thereby rendered void in the absence of proof of misrepresentation. *Allen v. Phoenix Assur. Co.*, (Idaho 1906) 88 Pac. 245.

Waiver by company. Estoppel. Where a standard fire insurance policy was issued upon an oral application, without any statement by the insured as to his title, the company thereby waived a forfeiture clause in case his ownership was otherwise than unconditional and sole in fee. As he has only a life estate it alone was insured and its value is the measure of liability. There is appended a list of authorities, *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 79 N. E. 905. Although a fire insurance policy contains a clause that the policy should be void if the owner of the building did not own the land, yet, if the company has notice through its agent that the insured

does not own the land, it is estopped from refusing to pay the loss, even when the policy contains a clause forbidding the agent to make any waiver of any of the conditions of the policy. *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339. According to Code of 1904 s. 1338 all beds of the bays, and the shores of the sea shall remain the property of the State. The owner of a hotel, built on a long pier over the bed of a bay, took out a fire insurance policy containing a clause that the policy should be void in case the insured did not possess the sole and unconditional ownership of the land; and no representation was made as to the ownership of the land. In view of the statute above quoted the insurer is estopped to deny that he knew the land was not owned by the insured especially considering that the location of the building was known, *Westchester Fire Ins. Co. v. Ocean V. P. Pier Co.*, 106 Va. 633, 56 S. E. 584. A policy providing that it shall be void if the subject of the insurance is a building on ground not owned by the insured in fee simple is void if nothing is said by either party, at the time the insurance is placed, about ownership and the fact is that the clause is violated, though the insured was ignorant of the clause in question, *Wyandotte Brewing Co. v. Hartford Fire Ins. Co.*, 144 Mich. 440, 108 N. W. 393.

Sec. 273. Condition in policy against change in title of insured by alienation or incumbrance.

Breach. A change in ownership of a property resulting from a conveyance to a third person by the owner who took back a mortgage invalidated an insurance policy providing that no change of ownership should occur without the consent of the insurer. *Jump v. North British & Mercantile Ins. Co. of London and Edinburgh*, 44 Wash. 596, 87 Pac. 928. The insurance agent wrote out a policy, saying that the property was unincumbered and making all statements warranties. In the absence of proof of a waiver by the insurance company the policy was void if there were a mortgage on the property. *Deming Inv. Co. v. Shawnee F. I. Co.*, 16 Okl. 1, 83 Pac. 918.

No breach. A sale of insured property, unaccompanied by any change of possession and attended by an immediate resale to the insured is not such change of ownership as will prejudice the insurance company and avoid the insurance, *Schloss & Kahn v. Westchester Fire Ins. Co.*, 141 Ala. 566, 37 So. 701. Although a fire insurance policy provides that if

any change in the interest of the insured occurs the policy shall be void, a contract to sell the property does not constitute a sufficient change of interest to invalidate the policy where the possession has not been surrendered. *Garner v. Milwaukee M. I. Co.*, 73 Kan. 127, 84 Pac. 717. Where a mortgagee took the title to real estate covered by an insurance policy which required notice in case of a change of ownership, the interest of the mortgagee did not necessarily merge with the legal title, since it was against his interest, so he was able to collect the insurance; and such a change of title was insufficient to require notice to the insurance company from the mortgagee. *Fort S. B. & L. Ass'n v. P. Ins. Co.*, 74 Kan. 272; 86 Pac. 143. A clause in a fire insurance policy declaring a change of interest in the insured premises to forfeit the policy is not violated by a contract of sale, under which the intending vendee takes possession for experimental purposes, but which is subject to free access and complete management by the owner, and amounts to a mere option to buy. Nor under these facts is there a change of possession which under the policy works a forfeiture. *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 89 Pac. 102. When a policy containing the mortgage clause "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee. . . . , the conditions herebefore contained shall apply in the manner expressed. . . . relating to such interest as shall be written upon, attached or appended hereto," a change of ownership without the consent of the insurer did not invalidate the rights of the mortgagee to recover, since the court construed the mortgage clause as putting the mortgagee in possession of all the rights possessed under the conditions of the policy of the owner himself, *Welch v. British Am. Assur. Co.*, 148 Cal. 223, 82 Pac. 964.

Waiver by insurance company. A fire insurance policy clause making it void if any change occurs in the title or the policy be assigned without the company's consent, is waived where the local agent advised the insured to make the transfer and assign the policy. *Ins. Co. v. Stanston & Co.*, (Ky. 1907) 100 S. W. 338. Where the agent of an insurance company was present when a contract for the sale of the insured promises was entered into and stated that he preferred to have the policy transferred rather than cancelled, his statement amounted to an agreement on the part of the insurance

company to continue the policy in force which was enforceable although the policy was not actually transferred, *Insurance Co. v. Mattingly*, (Ky. 1906) 90 S. W. 577. A clause in a fire insurance policy, avoiding the policy in case of an encumbrance suffered without the Company's consent, was waived when the insured wrote the Company that he had encumbered it and wished to remove the house on the land to a new location, and the Company wrote back that they would send him an endorsement covering insurance in its new location when moved. *Capital Fire Ins. Co. v. Johnson*, 82 Ark. 90, 100 S. W. 749.

Sec. 274. Condition in policy against vacancy or change of use of premises.

Breach. A fire insurance policy contained a clause that the policy was void if the premises were "personally unoccupied for ten days without the consent of the insurer." The plaintiff's tenant moved away with his family more than ten days previous to the fire and occupied a flat in the town, and although the tenant worked on the farm or had a neighbor care for the stock every day, the policy was void when consent to the non-occupancy had not been secured, *Knowlton v. Patrons A. M. F. I. Co.*, 100 Me. 481, 62 Atl. 289.

No breach. Where premises had been unoccupied more than 10 days pending insurance but were later again occupied the policy was not avoided, *Insurance Co. of North America v. Pitts*, 88 Miss. 587, 41 S. 5. Where a fire insurance policy containing a clause providing that it should be void if the premises became unoccupied, was issued with knowledge that they were being occupied as a tenement house by a tenant, the latter's removal without the knowledge of the insured within four hours of the fire, did not make the policy void, *Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 239, 76 N. E. 977. Where fire insurance was issued upon a house then in the process of erection permission was given to the insured "for mechanics to work in and about the premises 30 days from date." After the expiration of such period the house never having been occupied did not become "vacant or unoccupied" because the mechanics left it. Whether allowing the house to remain thus increased the risk was a question of fact for the jury, *Harris v. North American Ins. Co.*, 190 Mass. 361, 77 N. E. 493. Under a fire policy which read: "Permission

granted for the above-described works to remain idle, it being warranted by the assured that at all times when the works are idle or inoperative—watchmen shall be—on duty at night,” there was no forfeiture, although there was no watchman at night, where it was not shown to be usual or customary to operate such works at night, and where during the day none of the large furnaces of the assured were operated and the only operation was that of a small furnace, put up temporarily, by one to whom the insured had given an option for purchase of the premises, for the purpose of testing the slag and the ore on the premises, *Mackintosh v. Agricultural Fire Ins. Co.*, Cal. 440, 89 Pac. 102.

Waiver by insurance company. The issue of a policy of insurance on a house held under a sheriff's certificate and occupied at the time by the owner is not a waiver, by the company, of the vacancy clause, *Chismore v. Anchor Fire Ins. Co.*, 131 Ia. 180, 108 N. W. 230. Where the insurer knows that a mill is likely not to be operated through failure of water a clause in the policy providing that it shall be void if the subject of the insurance is a manufacturing establishment and if it cease to be operated for 10 consecutive days will be held to be waived, *Wankan Milling Co. v. Citizens Mut. Fire Ins. Co.*, 130 Wis. 47, 109 N. W. 937. A waiver of the forfeiture of the policy was not made when the insurer accepted payment for the proportionate share of the losses occurring before and after his own loss, as the policy was mutual and all the members were liable for assessments, *Knowlton v. Patrons A. M. F. I. Co.*, 100 Me. 481, 62 Atl. 289.

Sec. 275. Cancellation of policy—Assessments.

Cancellation by company. When the agent sends a notice cancelling insurance policies and says that the unearned premiums will be paid on return of the policies, they are definitely cancelled, especially when said balance is less than enough to pay the premium on the policy to the time of the fire, *Hamburg Breman Fire Insurance Co. v. Browning*, 102 Va. 890, 48 S. E. 2. When an insurance company has received a premium for a policy containing a clause which provides for 5 days' notice of cancellation, the company cannot cancel the policy without such notice although negotiations were in progress concerning such cancellation, unless the evidence proves that the parties had definitely agreed upon a cancella-

tion of the policy, *Home Ins. Co. v. C. Lumber Co.*, 126 Ga. 334, 55 S. E. 11. If the evidence in an action to recover an insurance loss shows that notices of an assessment were sent, of which three or four were returned because of a mistake in addressing, the plaintiff may rebut the presumption that he received the notice of the assessment and by reason of non-payment forfeited his rights to insurance within 60 days as the by-laws of the company provided, by proving that the notice of the assessment was never received, *Sherrod v. Farmer's M. F. I. Ass'n*, 139 N. C. 167, 51 S. E. 910.

Assessments. If a policy holder in a foreign mutual fire insurance company is sued for a ratable proportion of its losses, the plaintiff must show that the laws of that state impose a statutory liability on him, *Swing v. Farrar*, 124 Ga. 951, 53 S. E. 269. Where a loss has been sustained by a mutual fire insurance company, the members cannot all withdraw and form another company and so avoid the payment of the loss, as the court may direct the levy of an assessment on the members of the old company, *Perry v. Farmer's Mut. Fire Ins. Ass'n*, 139 N. C. 374, 51 S. E. 1025.

Sec. 276. Proof of claim—Proceedings to recover.

Proofs of loss. For the sufficiency of proofs of loss under provisions in policy see, *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 So. 62. A loss occurred on a fire insurance policy and the insured made out a proof of loss in due form omitting some articles, but, although the company agreed to accept the estimate, it was a mere accord without satisfaction and did not bar an action on the policy for the articles omitted, as the insurance company was not making a compromise but both parties were agreeing to what they were already bound to accept. Neither yielded nor gained anything, *Manley v. Vermont Mut. Fire Ins. Co.* 78 Vt. 331, 62 Atl. 1020. When an insurance company gives entire authority to its agent to settle a loss, a waiver by him of one of the conditions of the policy is equivalent to a waiver by the company and when he waives the right of the company to a proof of the loss within sixty days, the company is bound by it. A denial of liability by the company within sixty days also amounts to a waiver of proof of loss. When the policy states that certain things require a waiver in writing endorsed on the policy, if the proof of loss is not one of the clauses which is mentioned,

then the agent of the company may waive that clause, *Frost v. North Bri. Mer. Ins. Co.*, 77 Vt. 407, 60 Atl. 803.

Notice of loss. Under the clause providing that the insured shall give notice of loss a failure to do so will not invalidate the policy, in the absence of a stipulation to that effect, but will merely postpone the day of payment, where the notice is given within the time limited for the bringing of suits on the policy, *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 So. 62.

Appraisal. If there is a provision in a fire insurance policy that in case of a disagreement as to the amount of loss there shall be an appraisal and no suit brought thereon until such appraisal is made, the having of an appraisal is a condition precedent to recovery unless the insured shows a legal excuse therefor, (*Grand Rapids Ins. Co. v. Finn*, 54 N. E. 545, 60 Ohio St. 513, overruled). *Graham v. Germania American Ins. Co.*, 75 Ohio 374, 79 N. E. 930. A referee appointed by an insurance company on a board to settle a claim for a loss by fire refused to agree upon the selection of any man from the neighborhood where the loss occurred as referee, as he said that the insurance company objected to it. The referees must be absolutely disinterested according to the provisions of the Maine Standard policy held by the insured and therefore as this referee showed he was evidently acting in the interests of the insurance company he was not disinterested and the award was void, *Young v. Aetna Ins. Co.*, (Me. 1906) 64 Atl. 584.

Action on failure of arbitration. If the appraisers disagree although the insured has done his best to break the deadlock, he may bring suit at once on a policy which provides that the damage shall be submitted to arbitration in case the parties disagree and that the insurance shall not be paid until 60 days after an award by the appraisers, *Bernhard v. Rochester G. Ins. Co.*, (Conn. 1906) 65 Atl. 134. The insured made out proofs of loss and duly forwarded them to the company; then arbitrators were appointed to determine the loss, but they disagreed after signing the award and one of the arbitrators erased his name, but as the policy provided that the amount due should be determined by arbitration, the right of the insured to bring suit did not accrue when the arbitrators had merely disagreed through the fault of neither of the parties, *Grady v. Home F. & M. I. Co.*, 27 R. I. 435,

63 Atl. 173. Where suit is brought on a policy of fire insurance covering, in different amounts, a dwelling house and the furniture therein located, the verdict need not specify separately the amounts found for loss of the house and of the furniture, but may be a lump sum covering the entire amount of the loss. *Georgia Co-operative Fire Ass'n v. Harris*, 124 Ga. 114, 52 S. E. 88.

IRRIGATION

Right to take by eminent domain for irrigation and drainage purposes, see *ante* §119.

As to right to take water, see further *post* §619.

See further DRAINAGE, WATERS.

Sec. 277. For what lands water may be taken—Inter-state rights. An assignee of a landowner holding a right to water for irrigation within an organized irrigation district has no right to divert water allotted to him from land in the district to land outside the district, and five years' use on outside land on which he planted alfalfa and walnut trees does not give him any rights by prescription. *Janison v. Redfield*, 149 Cal. 500, 87 Pac. 62. A tract of land, which was part of certain riparian lands, was sold by A to B, leaving none of B's land abutting on the river so B had no right to take water as a riparian owner, although water had previously been used by A on the land. Another riparian owner had a right to bring suit to enjoin such use by B. The right to use water on B's non-riparian land was not obtained although A subsequently repurchased the riparian tract from B, *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 88 Pac. 978.

Inter-state rights. P. L. 1905, p. 461, forbidding the diversion of any water to another State, was construed, *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 695, 61 Atl. 710. Act May 11, 1905 (P. L. 1905, p. 461), prohibiting the taking of water of streams, lakes, etc., beyond the boundary of the state, was construed. For a full discussion see *McCarter v. Hudson C. W. Co.* (N. J. Err. & App. 1906) 65 Atl. 489. Upon the ground that it was for the public interest to prevent the diversion, by a riparian proprietor, of the waters

of an important stream of fresh water outside the boundaries of the State in which it flows, such State may, by statute, prohibit such diversion, *Hudson County Water Co. v. McCarter*, 209 U. S. 349. The government of the United States being one of enumerated powers and having no grant of control over the irrigation of arid lands the determination of the rights of the states of Kansas and Colorado in regard to the flow of waters in the Arkansas river is not subordinate to a superior right of the national government, there being no question of the navigability of the stream. In considering the rights of two adjoining states to the waters of a stream the court will not confine itself to the question of the amount of water in the channel of the river but will consider what will be the general effect upon the territory of the lower state of the taking of the water by the upper, *Kansas v. Colorado*, 206 U. S. 46.

Sec. 278. Rights of prior appropriators. A prior appropriator of water has a right to use water to increase the growth of grass for pasturage and such use is a "beneficial use" under the provisions of Civ. Code §1881, *Sayre v. Johnson*, 33 Mont. 15, 81 Pac. 389. Where certain springs are the sources of a creek, the defendants have no right to appropriate them to the injury of prior appropriators of the water of the creek even if the passage from the springs to the creek is subterranean, and the amount of water flowing in it is increased by seepage by irrigating higher land, *Clark v. Ashley*, 34 Colo. 285, 82 Pac. 588. Where a prior appropriator of water from a stream does not enlarge the area of arid land which he irrigates for five years, he has no right to divert more water in order to irrigate the remainder of his land and cut off the rights of intervening appropriators, if no cause for the delay is shown, *Seaward v. Pacific L. S. Co.*, (Or. 1907) 88 Pac. 963. Although a prior appropriator of water had dug a ditch and used it to carry water to placer properties, a subsequent appropriator had a right to use the water of the stream when the plaintiff did not apply all of the water to a beneficial use, provided he did not take so much as to damage the prior appropriator, *Mann v. Parker*, 48 Ore. 321, 86 Pac. 598. The method of appropriating water by posting a notice as provided by Civ. Code ss. 1415-1421 is not exclusive, but actual prior appropriation and use are sufficient to establish a right

paramount to that of a subsequent appropriator, and the fact that the water was not taken through a headgate but merely by a ditch cut in the side of the levee does not affect the right to take the water, *Lower Tule R. D. Co. v. Angiola Water Co.*, 149 Cal. 496, 86 Pac. 1081. A prior appropriator of water from a creek has a prior right to springs or seepage water rising in the creek above the head of his canal although they rise on a tributary creek, but if the creek become dry below the springs before reaching the plaintiff's land the defendant may use the water which would otherwise become lost, *Beaverhead Canal Co. v. Dillon E. L. & P. Co.*, 34 Mont. 135, 85 Pac. 880. A made a contract with B, a squatter, for the purchase of a certain tract of government land and a water right, which the squatter had occupied, but such a contract under which part of the purchase price was paid down and the balance was paid in two years, when a deed was delivered, was not a break in the use of the water right which would entitle an appropriator subsequent to B to maintain a prior right to the water against A, *Brown v. Newell*, 12 Idaho 166, 85 Pac. 385. Act. Feb. 25, 1899 (Sess. Laws 1899, p. 380) was construed as enabling one, who posted and recorded his notice in accordance with the statute and prosecuted his work with reasonable diligence, to appropriate water from a stream by his ditch, and his right was prior to the right of another appropriator who subsequently posted a notice or actually appropriated water from the stream after defendant had posted his notice, provided he constructed his irrigation works diligently, *Sand P. W. & L. Co. v. Panhandle D. Co.*, 11 Idaho 405, 83 Pac. 347.

When a prior appropriator does not need water he has no right to loan to a subsequent appropriator his water so as to deprive an intervening appropriator of water, as the usual rule is that an appropriator who has no immediate need for water must not divert it from the stream, but it is his duty to let it flow in the channel so it will be used by the other appropriators in order of the priority of their appropriation, and the burden of proof lies on the parties to the agreement to loan water in accordance with the provisions of Sess. Laws 1899, c. 105, p. 236, *Ft. Lyon C. Co. v. Chew*, 33 Colo. 392, 81 Pac. 37.

Mexican grants. The rights of riparian owners, holding under a grant from Mexico previous to the treaty of Guada-

loupe, were construed to be subject to legislative control as in Mexico so the Arizona Legislature might establish the privilege of prior appropriation, and other owners besides the riparian owners might be granted the privilege and the owner of the Mexican land grant would have no cause of action, *Boquillas Land & Cattle Co. v. Curtis*, (Ariz. 1907) 89 Pac. 504.

Sec. 279. Title by adverse use. In regard to appropriations of water previous to 1886, the common law governs and each riparian owner has an equal right to the use of the stream and no prescriptive right is acquired by an upper riparian appropriator when there always has been a sufficient supply for the needs of all users of water, *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571. The plaintiff acquired a right to use the water from a ditch by adverse use for over 20 years and the court decreed that a permanent headgate dam and measuring box should be established; but it was not necessary to give notice to the defendants that they were going to use their regular amount of water for irrigation every time they opened the headgate as twenty years' use had given them the absolute right, *Wutchumna Water Co. v. Ragle*, 148 Cal. 759, 84 Pac. 162. Although the owner of a hotel claimed a right to certain mineral springs under an executed parol contract that he and his guests should have an easement to use the springs if he would build his hotel, a purchaser was not charged with notice of the easement when everybody in the town used the springs, and such use was a mere license which could not ripen into an easement by prescription, although the use continued for more than forty years, provided there had always been a surplus of water beyond what was required by the owners of the springs, *Jobling v. Tuttle*, 75 Kan. 351, 89 Pac. 699.

Amount. When an appropriator of water used 25 cubic feet per second for nine years and 60 cubic feet per second for two years, he had acquired a prescriptive right to the 25 cubic feet of water if the lower riparian appropriator did not disturb his use of the water, *Hubbs & Miner D. Co. v. P. Water Co.*, 148 Col. 407, 83 Pac. 253. Where a number of parties beside the plaintiff used what they needed of the water of a creek during the statutory time, he was not entitled to a

decree giving him the exclusive use of the water, and he only was granted the proportional amount which he had used. *Bullerdick v. Hermismeyer*, 32 Mont. 541, 81 Pac. 334.

Interruptions. Where a settler took possession of a ditch on adjoining land and used water from it for 10 years, his prescriptive right was defeated if the owner sometimes turned the whole of the water on to a meadow to irrigate it and made other uses of the water during the ten years, *McRae v. Small*, 48 Ore. 139, 85 Pac. 503. The plaintiff maintained a ditch over the defendant's land to convey water for more than six years and acquired a prescriptive right to use it, but the adverse use was not interfered with although the defendant used the ditch to carry a part of his own water for irrigation, *Smith v. Hampshire*, (Cal. 1906) 87 Pac. 224.

Sec. 280. Various water rights—Contracts. The right of a landowner to have water flow from a canal through his land is a servitude upon the canal and ditch and is real property, *Stanislaus Water Co. v. Bachman*, (Cal. 1908) 93 Pac. 858. After the water necessary for domestic use has been taken, two settlers of government land owning approximately the same amount of land are entitled to an equal amount of water, *Nesalhous v. Walker*, (Wash. 1907) 88 Pac. 1032.

Where a colonization company sold land to the plaintiff with a water right, and the plaintiff raised orchards which depended on the water for their growth, a subsequent purchaser of the company with notice of the covenant to supply the plaintiff with water was restrained from cutting off the plaintiff's water supply, *Hunt v. Jones*, 149 Cal. 287, 86 Pac. 686. •

Ballinger's Ann. Codes & St. s. 4156, relating to the exemption from condemnation of water "needed" by the riparian owners, is construed as exempting the water needed by such owners to irrigate their lands, or which they intend to use in irrigating their lands in the near future, although if the water reserved is not appropriated by the riparian owners, another application for it may be made to the court, *State ex rel. Liberty Lake Irr. Co. v. Superior Court*, (Wash. 1907) 91 Pac. 968. In consideration of a grant of a right of way over land for an irrigation ditch the plaintiff was assigned 20 shares of stock of an irrigation company which carried with it the right to the use of a definite proportion of water

of the ditch, but the plaintiff had no right to use water the priority to which was subsequently purchased by the defendant, *True v. Rocky F. C. R. & L. Co.*, 36 Colo. 43, 85 Pac. 842. The State granted a right to retain the waters of a lake by a dam for the purpose of irrigation, and a riparian owner, holding under a grant from the United States before the State was created, had no vested riparian rights as the lake was navigable since it was about a mile and a half long, with an average depth of 16 feet and was used by a small steamboat and rowboats. The owners of the dam had a right to the water when they did not raise it above high water mark or lower it below low water mark by their use, *Kalez v. Spokane V. L. & W. Co.*, 42 Wash. 43, 84 Pac. 395.

Sharing expenses. A large number of the owners of land had erected a dam and constructed irrigation ditches and by common custom each owner shared in the expense of maintaining the part of the ditch above his land. A corporation was formed and shares of stock were issued in proportion to the acreage irrigated but the defendant did not take any shares of stock and he was not liable for repairs to the ditch by cementing or building a flume below his land which was of no benefit to him. He should contribute his proportional share to the expense of the improvements above his land which benefited him directly. *Arroyo D. & W. Co. v. Bequette*, 149 Cal. 543, 87 Pac. 11.

Right to whole flow on certain days. When an appropriator of water was unable to irrigate his land by a continuous flow of his proportional share of the water from a stream, he was not compelled to furrow his land before irrigation but he might have the whole flow of the stream for a certain number of days every month when that was necessary and more economical, since less water was wasted by seepage and evaporation than if a small stream were used, *Nephi Irr. Co. v. Vickers*, 29 Utah 315 Pac. 144.

Right to percolating water. Rev. St. 1868, p. 130 c. 18 §48, relating to the condemnation of land for a right of way by an irrigation company was construed as not giving a canal company, whose right of way passed through the defendant's land, the right to take percolating waters which had been allowed to flow into the canal when the defendant made no use of them. *Smith Canal & Ditch Co. v. Colorado I. & S. Co.*, 34 Colo. 485, 82 Pac. 940.

Right to store water. The owner of a priority for direct irrigation may store the water thereby represented, measured by volume and time, for use later in the season where by the change no greater burden is imposed upon the common source of supply, *Seven Lakes Reservoir Co. v. New Loveland & Greeley Irrigation and Land Co.* (Colo. 1907) 93 Pac. 485. A grantee of a water right could not store water in a pond which was not permanent in *F. S. Royster Guano Co. v. Fowler*, 75 S. C. 434, 56 S. E. 11.

Rights in artificial flow. Where a tunnel has been driven into the side of a mountain from which an additional flow of water enters a stream, the plaintiffs have no rights to file an exclusive claim to the ownership of the water, when they did not share the expense of driving it or purchase the rights of the persons who drove the tunnel, and the increased flow belongs equally to all the users of the water, *Farmers U. D. Co. v. Rio Grande C. Co.*, 37 Colo. 512, 86 Pac. 1042.

Effect of decree. Where a decree has been made under Colorado Sess. Laws 1879, p. 99, §19, and Sess. Laws 1881, p. 142 which determines the rights of the owners of ditches supplying water for irrigation, a consumer of water purchased from one of the ditches had no right to have the court consider the question again as the decree was final in the absence of proof of fraud. *Combs v. Farmer's High Line C. & Reservoir Co.*, (Colo. 1907), 88 Pac. 396.

Irrigation contracts. Const., Art. 14, does not prohibit the making of contracts for the permanent use of water for irrigation, but merely gives the state the power to control such use, *Stanislaus Water Co. v. Bachman*, (Cal. 1908) 93 Pac. 858. An irrigation contract construed and it was held not to create in the purchaser an exclusive right to the water impounded by a certain dam, but both parties could use the water equitably for irrigation purposes, *Metcalf v. Faucher*, (Tex. Civ. App., 1907) 99 S. W. 1038. Where A sold to B a half interest in an irrigation ditch "Together with one half interest in the water belonging to said ditch or which is entitled to run through the said ditch either by decree appropriation, or otherwise, B had a right to use 20 inches which A had transferred to the ditch, although he had been assigned it from another ditch. If no judicial proceedings had validated the transfer and if the approval of the court had not

been obtained, A could transfer the 20 inches back to the other ditch and use it himself without compensation to B, *Fluke v. Ford*, 35 Colo. 112, 84 Pac. 469. A contract for the sale of water rights provided that the right to use the water "shall be deemed. . . . as appurtenant to and as a part and for the benefit of said lands of the plaintiff and all subsequent owners," but the plaintiff had a right under this contract to sell surplus water provided he did not take more than he had purchased, *Calkens v. Sorosis F. Co.*, 150 Cal. 426, 88 Pac. 1094. A made an agreement with the owners of a ditch that he should be allowed to increase the size of the ditch so as to convey more water through it, but reserving to the owners of the ditch all their "present rights" to the use of the water. When A built a larger ditch higher than the old one with the parol consent of the landowners, an owner of land, who had 46 acres between the locations of the two ditches, which could be irrigated by the new ditch by gravity and not by the old ditch, did not have a right to take more water than he needed to irrigate the land which could be irrigated from the old ditch, *Southside Imp. Co. v. Burson*, 147 Cal. 401, 81 Pac. 1107. Where parties to a contract for the division of the waters of a stream, providing that one shall have a certain number of inches and the other the balance, had been for years using the surface flow only, and where the contract provides for the undiminished flow to the dam at which point the division is to be made, the measurement is to be based on such natural flow so that the party entitled to the balance will take all water he saved by bringing it to the dam through a pipe line and all water he obtains by development work in the dry bed of the creek, *Pomona Land & Water Co. v. San Antonio Water Co.*, (Cal. 1908) 93 Pac. 881. When the owners of land contracted with the builder of an irrigation ditch to receive a share of the water and pay a part of the expense of operating the ditch, they were not compelled to pay a proportionate share of an extension of the ditch to other lands, but the users of the extended ditch should pay an amount equal to the increased proportion of water flowing in the ditch by reason of such extension to defray the cost of operating the original ditch. *Riverside H. W. Co. v. Riverside T. Co.*, 148 Cal. 457, 83 Pac. 1003.

Sec. 281—Actions—Equitable relief. For an action of trespass for interference with an irrigation ditch and taking water from it see *Mau v. Stoner*, (Wyo. 1906) 87 Pac. 434.

Injunction. In a petition to enjoin an unlawful diversion of a stream of water flowing from a spring on adjacent property, from which the petitioner obtained a neverfailing supply for domestic purposes, where the judge finds that the plaintiff has established his contention, no qualification should attach to the injunction, *Stoner v. Patten*, 124 Ga. 754, 52 S. E. 894. Although a decree had been issued which forbade the defendant from interfering with the irrigation ditch or taking more water than was allotted him by the water commissioner, a taking of water after the H company had been dissolved, when there was no water commissioner, was not a breach of the decree for which damages should be awarded. *Thompson v. MacFarland*, 29 Utah 455, 82 Pac. 478.

Parties. If the prior appropriators of water bring a suit to enjoin the use of water by subsequent appropriators, the latter are essential parties to the suit when their rights are affected and if a decree is made in their absence it is void, *Squire v. Livesey*, 36 Colo. 302, 85 Pac. 181.

Contributory negligence. When water from an irrigation ditch overflowed the plaintiff's land in consequence of the negligence of the defendants in regulating the amount of water passing through the headgate, the defendant could not avoid all damages for the destruction of the plaintiff's crops on the ground that the plaintiff was negligent in not draining the water from the land, and an instruction to the jury that the plaintiff was negligent if she sat passively by and saw her crop damaged, was misleading as the jury might consider the plaintiff's negligence a complete bar to recovery whereas it would only operate to mitigate the damages, *Belnap v. Widdison*, (Utah 1907) 90 Atl. 393.

Notice to the owner of land condemned for irrigation ditches must be given, *Sterritt v. Young*, 14 Wyo. 146, 82 Pac. 946.

Limitations. Although Mills Ann. St. s. 2435 provides that an action regarding a decree under the irrigation statutes shall not be brought more than four years after the decree, an owner whose priority was determined but whose ditch was unfinished may have his water rights determined more than four

years after the decree deciding his priority, *In re priorities of Water Rights in D. No. 12*, 33 Colo. 270, 80 Pac. 891.

A canal company in water district A had its prior right to water decided by the court, and another canal company had its right to draw water in water district B determined by a court, and neither company participated in the proceedings by which the priorities of the other company were determined, but by Mill's Ann. St. ss. 2434, 2435 all actions were barred after four years from the time of a determination of water priorities, and as more than four years had passed since the time of the actions by which the water rights of the two canal companies were determined, any action between them to determine their respective rights was barred. *Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet I. L. Co.*, (Colo. 1907) 90 Pac. 1023.

Commissioner. Rev. St. 1899, §910, amended by Sess. Laws 1903, p. 122, c. 93, were construed as making the decision of a commissioner or judge final in actions for the appointment of a water commissioner to distribute and apportion water between irrigation canals, and an appeal might not be taken higher than the district court, *Mau v. Stoner*, 14 Wyo. 183, 83 Pac. 218. The court apportioned the entire supply of a river between several claimants in order of priority of appropriation, and appointed a commissioner to regulate the exact amount of water taken by each riparian owner at each stage of the river in the dry season. The commissioner was to be paid by the appropriators a fair compensation, he was to report to the court from time to time and any of the appropriators might have the court review his decisions. Such an appointment was held valid by the Supreme Court of Arizona, *Smith v. Imperial Copper Co.*, (Ariz. 1907) 89 Pac. 510.

A judgment made in an irrigation suit was reversed by the judge the next day when outside the county by a telephone message to the clerk without allowing the parties interested to appear in court, and it was void, although the judge could have made the alteration during the same term in open court, *O'Brophy v. Era Gold Min. Co.*, 36 Colo. 247, 85 Pac. 679.

Damages. A waste ditch constructed by the defendant in a negligent manner caused water to flow on the plaintiff's land, making lakes and ponds so that alkali rose to the surface, and the land was rendered useless for agriculture. The measure of damages was the difference in value of the land before and after the overflow, *Young v. Extension Ditch Co.*, (Idaho

1907) 89 Pac. 296. If an irrigation company fails to deliver water as provided in its contract and the plaintiff's crops are thereby lost, the company is liable for damages and the cost of alfalfa and timothy seed planted for the stand of crops for a number of years is an element of damage, *Candler v. Washoe L. R. & G. C. D. Co.*, 28 Nev. 151, 80 Pac. 751. An irrigation ditch which was raised in places above the level of the soil was constructed of loose material so the water seeped through onto the plaintiff's land and damaged it by rendering it boggy and causing the alkali to rise to the surface. The corporation owning the ditch was liable for damages, *Howell v. Big Horn Basin C. Co.*, 14 Wyo. 14, 81 Pac. 785.

Sec. 282. Irrigation companies and districts.

Irrigation companies. Rights of way over state lands are granted to irrigation companies by Wash. Laws 1907 Ch. 161. When the plaintiff became entitled by the decree of the court to the service of an irrigation company, he has a right to recover an excess price charged by the company above the ordinary reasonable rate, *Salt R. V. C. Co. v. Nelssen*, (Ariz. 1906), 85 Pac. 117. If the consumers of water from an irrigation canal give up their old contracts when a new company buys the canal, and receive their contracts reserving to the company the right to distribute the water pro rata in case of an insufficient supply, they have no right to claim a priority of use, which their former contracts allowed, but they must consent to a pro rata division of the water in case of shortage, *O'Neil v. Ft. Lyon Canal Co.*, (Colo. 1907) 90 Pac. 849. The owners of water rights along an irrigation ditch conveyed all their rights to a corporation and received shares of stock, which entitled them to the use of the water from the ditch as before. A sold eight shares of stock to B with his land, and B sold the land without the stock to C, who used the water, and the court decided that the water right was appurtenant to the land and that it passed with the property to C, (See Civ. Code sec. 1311) *In re Thomas's Estate*, 147 Cal. 236, 81 Pac. 539. If the course of a ditch has become very unsuitable, its course may be changed so as to avoid the difficulty in spite of the objection of some of the stockholders through whose land it runs, but when the change is proposed merely to prevent the expense of rebuilding the ditch each spring after the flood waters of an arroyo have subsided, the change will not be al-

lowed especially if it will result in continuous and irreparable injury to minority stockholders. *Candelaria v. Vallejos*, (N. M. 1905) 81 Pac. 589.

Irrigation districts are empowered to provide for drainage within their limits by Cal. Stat. 1907 Ch. 298. The provisions of law relative to the election of directors of irrigation districts and the duties of the treasurers of said districts as contained in Ch. 113 of the Laws of 1905 are amended by Cal. Laws of 1907 Ch. 194. The laws 1901 (Colorado) p. 198, c. 87, relating to the organization and government of irrigation districts, were construed in *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 525, 85 Pac. 313. Laws 1901, p. 199, c. 87, s. 2, relating to the organization and government of irrigation districts were construed in *Ahern v. Board of D. of H. L. Irrigation District*, (Colo. 1907) 89 Pac. 963. The organization and management of irrigation districts is provided for by Id. Laws 1907 Sen. Bill No. 140, amending Act of Mch. 19, 1903. The method of organizing irrigation districts and the details of their management are provided for by Mont. Laws 1907 Ch. 70. Under Sec. 6846 of Cobbeys' Ann. Stat. 1903 directors of irrigation districts are justified in employing engineers to prepare plans for canals &c. before any taxes are levied, *Willow Springs Irr. Dist. v. Wilson*, (Neb. 1905) 104 N. W. 165. The organization, government and powers of irrigation districts are provided for by Wy. Laws 1907 Ch. 72. When an irrigation district has been formed under Laws 1903, p. 150, an individual owner may waive his rights to receive water and he may contract with the government for water from a different source. In that case no part of the bond issue can be apportioned to the land of the owner who has executed a waiver of all claims against the district for water, *Nampa & M. Irr. Dist. v. Brose*, 11 Idaho 474, 83 Pac. 499. *Petition, under Sess. Laws 1899, c. 105*, to obtain a change in the point of diversion of water from an irrigation ditch, the object being to transfer a right to take water from one district to another. Held—Before the above statutes were passed the owner of a right to take water might bring an equitable action to have determined, as against another owner, the right to change the point of diversion; this right was not confined to any particular territory. The statute has not changed the law in this respect and a decree thereunder is conclusive and binding upon all users within the same district and prima facie correct as

between different water districts. *Lower Latham Ditch Co. v. Bijou Irrigation Co.*, (Colo. 1908) 93 Pac. 483.

Sec. 283. Transfer and abandonment of rights.

Transfer. The purchaser at a foreclosure sale of a water system holds subject to the rights of a landowner whose contract was recorded subsequent to the mortgage and prior to the foreclosure, at least until his rights are terminated by foreclosure proceedings to which he is a party, *Stanislaus Water Co. v. Bachman*, (Cal. 1908) 93 Pac. 858. When A diverted water from B's irrigation ditch in 1888, '89, '90, and did not connect with the creek till later, his right to use the water was not transmitted to C who took up the land which had been abandoned by A, and B was entitled to damages for a diversion of the water by C which ruined B's crops. *Tubbs v. Robberts*, (Colo. 1907) 92 Pac. 220. A bought a piece of land from B with the understanding that he should have the use of a ditch containing drainage or seepage water, and B put him in possession of the land and he used the water while B lived for two years, with B's full consent and approval. Evidence was also introduced to show that the grant of the water was one of the considerations mentioned at the time of executing the deed. When C dammed A's ditch and diverted the water from A's land he was entitled to an injunction, *Fayter v. North*, 30 Utah 156, 83 Pac. 742. When a mortgage covered the property of the mortgagor without mentioning the water right, which was obtained by the use of a long ditch of which the mortgagor was a part owner, the mortgagee had no right, on foreclosure of the mortgage, to the use of water, although the mortgagor held 5 shares of the stock of an irrigation company which used 2 3/4 miles of the mortgagor's ditch as nothing appeared in the record to show how the stock had been acquired, *Bank of Visalia v. Smith*, 146 Cal. 398, 81 Pac. 542. When a sheriff selling land at an execution sale fails to include the water right, a use of the water for three years by the purchaser is not a bar to the application of the owner for the water to use on other land even if he had made no demand for it for three years. Although the ditch company had a clause in its by-laws providing that "any person who shall fail to pay for water for two consecutive years. . . . shall be deemed to have forfeited his right thereto", the title did not become vested in the company or in the consumer to whom the company

supplied the water when no positive action to declare a forfeiture was taken, *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. 175.

Abandonment. For conditions under which rights to the use of water are lost by abandonment see *Id.* Laws 1907, Ho. Bill No. 101, amending Sec. 11 of Act of Mch. 11, 1903. When a pipe line has been substituted for a flume to convey water across the plaintiff's land, it was not evidence of the intention to abandon the right to use the flume or take water, and the flume may be reconstructed, when the evidence of the officers of the corporation shows that they had no intention of abandoning any rights to use the water for irrigation, *Wood v. Etiwanda W. Co.*, 147 Cal. 228, 81 Pac. 512. Evidence that for 19 years before a decree and continuously thereafter until a short time before the action was begun the defendants used about 1-3 of the water awarded by the decree, together with evidence tending to show that defendants had no intention of repossessing themselves of the excess, is admissible to show the intention of the defendant not to use what was awarded to him. *Alamosa Creek Canal Co. v. Nelson*, (Colo. 1908) 93 Pac. 1112 (1908).

Sec. 284. Statutes. Title XXI §2450 (Sec. 7)—1 providing that real property belonging to any person may be taken by eminent domain is extended to cover water rights for irrigation by *Ariz. Laws of 1907 Ch. 91 Sec. 2.*

The time within which construction of works for the diversion of natural water courses must be begun is prescribed by *Cal. Stat. 1907, Ch. 429, amending Sec. 1416 of the Code.*

The formalities required of settlers upon irrigated lands to enable them to obtain patents therefor are set forth in *Col. Laws 1907, Ch. 169, amending Laws 1895, Ch. 70. Sess. Laws 1903 p. 278, c. 124, relating to a change in the place of taking water for irrigation, was construed, Wadsworth Ditch Co. v. Brown*, (Colo. 1907) 88 Pac. 1060.

Water masters are established and their duties prescribed by *Id. Laws 1907, Sen. Bill No. 69, amending Sec. 29 of the act approved Mch. 11, 1903. Sec. 3 and 23 of "An Act to Regulate the Appropriation and Diversion of the Public Waters," approved Mch. 11, 1903, relative to a permit for construction of irrigation works and the formation of water districts are amended by Id. Laws of 1907, Sen. Bill No. 99. As*

to issue of permits for appropriation of water for irrigation, see *Id.* Laws 1907 Sen. Bill No. 137.

The appropriation of water in streams in which the rights therein have been adjudicated is regulated by Mont. Laws 1907, Ch. 185.

The sale of educational lands for irrigation purposes is allowed by Neb. Laws 1907, Ch. 134. Comp. St. 1903, c. 93a, Art. 3, Sec. 1 & 46-53, exempting certain lands from the operation of the act, construed, *State v. Several Parcels of Land*, (Neb. 1907) 114 N. W. 283.

The appropriation and use of water are regulated generally by Nev. Laws 1907, Ch. XVIII.

The use and distribution of natural waters are regulated, officials provided and other details in relation thereto covered by a general irrigation law, N. Mex. Acts 1907, Ch. 49.

Liens provided by the irrigation law are made superior to other incumbrances by N. Mex. Acts 1907, Ch. 49, Sec. 52.

Road supervisors are given liens on land on which ditches are located which discharge water on country roads for the expense of diverting the water by Ore. Laws 1907, Ch. 165.

Regulations for the use of water for irrigation and other purposes are contained in So. D. Laws 1907, Ch. 180.

Sec. 36, 42 & 67, Ch. 108, Laws 1905, specifying certain duties and fees of State Engineer in connection with irrigation, amended, Utah Laws 1908, Ch. 156.

The control, regulation, distribution and measurement of stored waters are regulated by Wash Laws 1907, Ch. 144. Sess. Laws of Washington 1899, pp. 261 c. 131, or p. 262 §6, relating to taking a right of way by eminent domain for an irrigation ditch, were construed. *Fulton v. Methow T. Co.*, (Wash. 1906), 88 Pac. 117.

Duties of water commissioners are regulated by Wy. Laws 1907, Ch. 86.

Sec. 285. Irrigation works on public or homestead land.

The use of state lands for irrigation purposes is provided for by *Id.* Laws 1907, Sen. Bill No. 108, amending Acts of Mch. 6, 1899, Mch. 2, 1899, & Mch. 18, 1901.

Flowage of state lands is authorized by Wash Laws 1907, Ch. 125.

Act. of Cong. March 3, 1891, c. 561, s. 19, 26, Stat. 1102 et seq. (U. S. Comp. St. 1901, p. 1571) granting a right of way

to canal or ditch companies over public land when the map of their location has been filed and approved, was construed not to grant a right of way over land already occupied by a settler, and a forfeiture under the terms of the act in five years could be determined by the State courts if the work on the reservoir were not completed, *Baldrige v. Leon Lake Ditch &c. Co.*, 20 Colo. A 518, 80 Pac. 477.

Civil Code s. 1416 was construed to give an appropriator of water prior to the location of a homestead a right to the use of the water from the artesian wells if irrigation works were commenced within 60 days of the time of posting the notice of appropriation, but the appropriator had no right to bore more wells on the land which had been entered as homestead, *Wolfskill v. Smith*, (Cal. 1907) 89 Pac. 1001. Although an irrigation company built a ditch over the plaintiff's land before a government homestead patent had been granted, but after the filing of the homestead entry, the plaintiff was entitled to maintain a suit to enjoin the use of the ditch across his land, unless due compensation were given for it or the land condemned according to law for a ditch. *Atkinson v. Washington Irr. Co.*, 44 Wash. 75, 86 Pac. 1123.

JOINT TENANTS

See Tenants in Common and Joint Tenants.

JUDICIAL SALES

Execution sales, see that title.

Executor's Sale see *ante* §§171-173.

Of property of infants and insane persons, see *ante* §266.

Partition sales, see *post* §450.

Sec. 286. When authorized—Notice. Hurd's Illinois Rev. St. 1901, c. 3, sec. 111, authorizing the probate court to order the sale of land of which a decedent is seized with legal or equitable title where the estate is unable to make further

payment thereon, construed, *Fitzgerrell v. Turner*, 223 Ill. 332, 79 N. E. 76. A petition for the enforcement of an order for the sale of land of a decedent to pay debts filed more than 20 years after its entry which alleges that it was encumbered by dower rights, was swamp land in a drainage district of little value, and has recently become valuable, shows no cause for delay and the bill must be dismissed, *White v. Horn*, 224 Ill. 238, 79 N. E. 629.

Notice. Missouri Rev. St. 1879 section 148 as to publication of a notice of an application for a sale of real estate, construed, *Robbins v. Boulware*, 90 Mo. 33, 88 S. W. 674. Sales made by order of court, though improperly advertised, are made valid by N. J. Laws 1906, Ch. 87. Under Acts 1891, p. 24, s. 1, a judicial sale will be confirmed notwithstanding defects of the advertisement of sale, but where the advertisement was not published in two newspapers, and the property was not sold for a fair value so that a second mortgagee was injured, a resale was decreed, *McMullin v. Doughty*, 69 N. J. Eq. 649, 61 Atl. 265. Where an order appointing a receiver conferred upon him only the authority to sell a certain lot of land at a named price to named parties, collect the purchase money, and disburse the same under direction of the court, he was given no discretionary powers and it was not contemplated that he would take possession of the property or collect the rents, the applicants for the order of sale being in possession, *Wardlaw v. Herrington*, 125 Ga. 828, 54 S. E. 699.

Sec. 287. Rights and liabilities of purchasers. Alabama Code 1886, section 2917, as to deeds to purchasers at judicial sales applies only to deeds executed by the sheriff, *McGaugh v. Deposit Bank of Frankfort*, 147 Ala. 229, 40 S. 984. When a judgment for the sale of land provided that interest should be paid on the purchase money from the date of sale until confirmation the voluntary and unauthorized payment by the purchaser on the day of sale did not relieve him from liability for interest, *Haggin v. Montague*, (Ky. 1907) 102 S. W. 337.

Rents. When a purchaser at a sheriff's sale did not pay the balance of the purchase price for a number of months after the sheriff tendered him a deed, the purchaser was not entitled to rent for the time of the sale, but the rent did not belong to him until he paid for the deed, *Thompson v. Ramsey*, (N. J.

Ch. 1907) 66 Atl. 588. The purchaser at a mortgage foreclosure sale may not recover from the mortgagor the rents and profits from the premises during the pendency of an appeal from the order of sale, *Westerfield v. So. Omaha Loan Ass'n*, (Neb. 1905) 105 N. W. 1087.

Oral agreement. The evidence examined and held not to show an oral agreement by buyers at a judicial sale to hold the lands for the complainant and convey them to her when she should repay the purchase money, *Dooly v. Pinson*, (Ala. 1905) 39 S. 664. A parol agreement with the owner of land, against which sheriff's certificates of sale are outstanding, to take assignments of the certificates, procure deeds to the land and hold them as security for advances, may be proved, in spite of Sec. 2918 of the Code, prohibiting the proof of an express trust by parol. The purchaser from the sheriff gets no greater title than the debtor had, *McElroy v. Allfree*, 131 Ia. 112, 108 N. W. 116.

Sec. 288. Title passed by sale—Priority of liens. Kirby's Arkansas Digest, section 6321, with regard to the title passed by a conveyance in pursuance of a sale ordered by court, construed, *Wilson v. Gaylord*, 77 Ark. 477, 92 S. W. 26. For a full discussion of the sale of the decedent's real estate to pay debts under Code Civ. Proc. §2671. See in re Tuoby's Estate, *Shields v. Pauwelyn*, 33 Mont. 230, 83 Pac. 486. When an heir, owing money to a creditor, comes into possession of the estate of his ancestor, the judgment creditor cannot levy on the property and have his debt come in ahead of debts against the deceased ancestor as all the debts of the deceased must first be satisfied and the creditor of the heir merely gets whatever rights the heir receives. *Lippincott v. Smith*, 69 N. J. Eq. 243, 60 Atl. 330.

A purchaser at a judicial sale, under an appraisal where liens were actually deducted from the gross value, may not afterwards question the liens so deducted, *State v. Several Parcels of Land*, (Neb. 1906) 106 N. W. 601.

Lis pendens. If a judgment creditor attaches a property while a *lis pendens* is in existence and sells it at execution sale, the purchaser at the sale is affected by the *lis pendens*, *Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97.

Sec. 289. Setting aside sale—Irregularities—Effect of.

Sales, under decrees of Chancery Court, of lands in more than one county, are made valid by N. J. Laws 1906, Ch. 52. Code Sec. 4003, providing for a re-sale of property offered under an execution but not paid for by the original bidder, construed, *State Bank of Deep River v. Brown*, 128 Ia. 665, 105 N. W. 49. In an action against her infant children and their guardian asking for a resale, the infants answered and joined in the prayer for resale; and as the resale netted considerably more than the first sale, the second sale was valid, *Grunewald v. Cox*, 31 Ky. Law Rep. 674, 103 S. W. 275. That land sold by judicial decree is subject to a lien for several years' state and county taxes is not sufficient ground for setting aside the sale, but if the purchaser pays them the court should give her credit therefor, *Downing v. Thompson's Ex.*, (Ky. 1906) 92 S. W. 290. Where a foreclosure sale is made in violation of an agreement to take title to the property sold for the benefit of plaintiff and so long as he made certain payments on account of the mortgage to hold it and when the payments reached a specific sum to convey it to plaintiff the sale will be set aside, *Omaha Loan & Building Ass'n v. Hendee*, (Neb. 1906) 108 N. W. 190.

A purchaser at a judicial sale is entitled to interest on his money while the property is in litigation after the sale and before a resale, *McMullin v. Doughty*, 69 N. J. Eq. 649, 61 Atl. 265.

An unexplained delay of thirty-five years by heirs before attempting to set aside an attachment sale of land as invalid bars their right by laches, *Williams v. Bennett*, 75 Ark. 312, 89 S. W. 600. Where a sheriff's deed was made to the parties who furnished the money named in the return, when acquiesced in for 50 years, it will be presumed that it was done so by the appointment of the purchaser in execution of his trust, *Jackson v. Gunton*, (Penn. 1907), 67 Atl. 467.

Inadequacy of price. A sale of land worth \$70 an acre for 9 cents is, under Code Sec. 3790, and in absence of any statute, fraudulent, *Fortni v. Sedgwick*, 133 Ia. 233, 110 N. W. 460. A sale will not be set aside for inadequacy of price where the purchaser's witnesses testify that the price paid by him is fair and the only evidence presented in opposition is an offer of \$5,000, an advance of \$1,000, *George v. Cone*, (Ark. 1906) 91 S. W. 557. Evidence examined and held not to show that the

purchaser at a judicial sale made fifteen years before suit was brought obtained the property sold at a grossly inadequate price by fraudulently keeping other bidders away from the auction, *Locke v. Friedman et al.*, (Miss. 1907) 43 S. 673. Where a master in chancery acting under the mistaken belief that a bidder was acting for the complainant made a sale to the solicitor for the owner of the equity of redemption, in a foreclosure proceeding, for \$3000. and a few minutes later upon the arrival of the complainant's solicitor who explained the mistake and bid \$7000 the master accepted the latter bid, it was held that the chancellor properly exercised his discretion by refusing to approve either sale and ordering a resale, *Slack v. Cooper*, 219 Ill. 138, 76 N. E. 84.

LANDLORD AND TENANT

As to oil and gas leases, see OIL AND GAS.

Adverse possession as between, see *ante* §8.

Liability for defective premises, see *post* §420.

Rights of tenant on taking by eminent domain, see *ante* §136.

Fixtures as between landlord and tenant, see *ante* §193.

Mechanics' liens as to, see *post* §332.

Sec. 290. When the relation exists—State as landlord.

In a suit by mortgagors for an accounting the existence of an agreement after a settlement of the balance due that the mortgagors should continue in possession at a certain rental which, less interest on the balance due and taxes paid by the mortgagee, should be applied in payment of the debt, creates no liability other than what the law imposes under such circumstances. The relation of the parties is not that of landlord and tenant, *Sadler v. Jefferson*, 143 Ala. 669, 39 S. 380.

State as landlord. A tenant of the Commonwealth who by Mass. St. 1904, p. 340, c. 385, was obliged to pay a city an additional tax to that specified in the lease may recover the amount so paid of the Commonwealth. The latter in executing the lease acted not as sovereign, but as a private owner, *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387, 79 N. E. 827.

Sec. 291. Estoppel to deny title. A tenant cannot change the character of his possession and oust his landlord by buying or leasing from a third person, *Moulierre v. Coco*, 116 La. 845, 41 S. 113. A tenant could not convey by way of mortgage any interest not affected by his estoppel to deny the landlord's title, *McWhorter v. Stein*, (Ala. 1905) 39 S. 617. Although a tenant claimed that he himself held a superior title to the real estate he was estopped from asserting it when he had taken a lease to the premises and he was obliged to surrender the real estate at the expiration of the term as the lease provided, *Thomas v. Young*, (Conn. 1907) 65 Atl. 955. Although a tenant, who had leased an office in a large office building, had vacated the premises, he was still liable for rent nor was he able to defend the action for rent on the ground that the lessor, a national bank, had no power under the constitution to hold real estate and was forbidden to invest its funds in that manner by law *Farmers Deposit Nat. Bank of Pittsburg v. Western Penn. Fuel Co.*, 215 Pa. 115, 64 Atl. 374.

A charge to a jury in an action to recover land that where a tenant holds possession under another as his landlord he is estopped to deny his landlord's title, is not objectionable as involving the assumption that the defendant held as a tenant, *Anthony v. Seed*, 146 Ala. 193, 40 S. 577. A tenant for a year upon the death of the landlord during the term becomes the tenant of her real representatives and after the close of the term having made no contract for another year's tenancy and no proceeding having been instituted against him for 90 days, he had a right to remain until the end of the year under Ky. Statutes 1903, section 2295. In possible detainer, therefore, he as tenant cannot deny the landlord's title, *Smith v. Hardwick*, (Ky. 1905) 89 S. W. 731. Under Civil Code 1895, sec. 4813, the plaintiff sought to evict the defendant as a tenant at sufferance, from certain premises. The sole defence consisted of a denial of the relation of landlord and tenant, and it was not error to exclude from the evidence a deed from a third person to the defendant conveying the land from which it was sought to evict him, executed at a date prior to the time when the relation of landlord and tenant was alleged to begin; the plaintiff admitting the ownership by the defendant prior to such time. *Allen v. Lawson*, 125 Ga. 336, 54 S. E. 176.

Sec. 292. Tenancy at will. Where parties disagree as to the terms of a lease and the tenant occupies the premises during the negotiations, the tenancy is at will, *Swart v. W. U. Tel Co.*, 142 Mich. 21, 105 N. W. 74. Where a lease has been extinguished by the sale of the property upon foreclosure of a deed of trust executed before the lease, an oral agreement to allow the tenant to remain in possession until the expiration of the period mentioned in the lease, creates a mere tenancy at will, *McFarland R. E. Co. v. Gerardi Hotel Co.*, 202 Mo. 597, 100 S. W. 577. In New Jersey a lease of land for more than 3 years signed by an agent whose authority is not in writing creates as against the principal a mere lease at will. Ratification will not be inferred from knowledge that the tenant was making trade improvements unless they were of such a nature as indicated possession under a lease beyond the agent's authority, *Clement v. Young-McShea Amusement Co.*, (N. J. 1907), 67 Atl. 82.

Sec. 293. Yearly and monthly tenancy. A lease of a strip of land for a logging road and a camp site at a nominal yearly rental was valid when it provided that the lessee could abrogate the lease by giving one month's notice before the termination of the year or that the lessor could declare the lease forfeited for non-payment of rent. It was not invalid under Ballinger's Ann. Codes & St. s. 4570 as being for an indefinite term, *Morris v. Healy Lumber Co.*, (Wash. 1907) 91 Pac. 186. If a husband executes a lease to property owned as community property with his wife in which a third person has an interest, without the consent of the other parties, the lease is void, but the lessee has a right to remain the full year if he does not receive notice to quit within 60 days after the beginning of the second year of the lease when he has already sown his crop, (See Ballinger's Ann. Codes & St. s. 5528.) *Snyder v. Harding*, 38 Wash. 666, 80 Pac. 789.

From month to month. Missouri Rev. St. 1899, s. 4110, providing that all contracts of lease not in writing shall create tenancies from month to month, construed, *McFarland R. E. Co. v. Gerardi Hotel Co.*, 202 Mo. 597, 100 S. W. 577. The following written contract: "This contract—witnesseth: that the first party has, this day rented by the month their hotel building,—at a monthly rental of \$20., due and payable during the month, and in the event of the default and failure of the

said party of the second part to pay the rent when due, she is to give quiet and peaceable possession without further notice": created a lease from month to month, which either party could abandon by giving one month's notice, *Pulliam v. Sells*, (Ky. 1907) 99 S. W. 289. Tenancy from month to month created by holding over, see *post* §295.

Sec. 294. Tenancy at sufferance. Mass. Rev. Laws, c. 129, section 3, making tenants at sufferance liable for rent while in possession does not apply where the tenant has occupied without the express or implied assent of the plaintiff or one under whom he claims, *Carpenter v. Allen*, 189 Mass. 246, 75 N. E. 622.

Sec. 295. Holding over—Effect of. A tenant who holds over after the end of his term is presumed in absence of evidence to the contrary to remain a tenant on the same conditions as before, *Wilson v. Alexander*, 115 Tenn. 125, 88 S. W. 935. The lessee holding under a lease for 3 years with an option for 2 additional years need not give specific notice of intention to renew; his occupation after the 3 years have expired amounts to a holding under the lease, *Heffron v. Treber*, (S. D. 1907) 110 N. W. 781. Prior to the expiration of a lease the landlord served notice on the tenant that if he remained in possession he should consider him a tenant at \$75 per month. In this action for the first month's rental of \$75, the tenant answered that \$23 was a reasonable rental, that he had offered to stay for 4 months at that figure, that the owner had consented to his remaining but that they had failed to agree upon the rental. Held—There was a valid contract between the parties for a four month's lease which would be a defence to the action for more than a reasonable rent. *Schick-edantz v. Rincker*, (Neb. 1905) 106 N. W. 441.

Tenancy from month to month created. Ch. 31 Laws 1901 providing that tenants holding over under written leases become tenants from month to month, construed, *Slafter v. Siddall*, 97 Minn. 291, 106 N. W. 308. California Civ. Code §§827, 1161, relating to the creation of a tenancy from month to month after the expiration of a lease, or whether retention of the premises was unlawful detainer or not for which treble damages might be assessed was construed, *Vatuone v. Canobia*, (Cal. 1907) 88 Pac. 374.

Double rent exacted. If a subtenant is put in possession, an action may be maintained jointly against the tenant and subtenant for possession, if the sub-tenant holds over after the expiration of the lease; but a judgment for double rent may be entered against the original tenant only, *Fletcher v. Fletcher*, 123 Ga. 470, 51 S. E. 418. When an agent, who has had charge of premises for the collection of the rent for a long time, rents without authority a store for another year, the tenant is liable for double rent for holding over, if it is not proved that the owners ratified the act of their agent, *Noble v. Burney*, 124 Ga. 960, 53 S. E. 463.

Sec. 296. Forfeiture of tenant's estate—Waiver. Equity will not give relief from the forfeiture of a lease for breach of a covenant to pay taxes where the landlord will be subjected to the contest of the validity of an outstanding irredeemable tax title, *Kann v. King*, 204 U. S. 43. A landlord may not assert his right of entry for breach of conditions in the lease when he has received rent after the causes of forfeiture were known, *Kenny v. Sen'Si Lun*, 101 Minn. 253, 112 N. W. 220.

Waiver. The acceptance of rent by a landlord after knowledge of all the facts relied upon as constituting a forfeiture amounts to a waiver thereof, *Levy v. Blackmore*, (N. J. 1907) 67 Atl. 1022. Although a lease contains a provision that it shall be forfeited for failure to pay the rent punctually, and the landlord elected to declare a forfeiture, he may subsequently waive his right to possession of the premises by accepting from the lessee the rent which had accrued after the landlord claimed a forfeiture, *Hartford Wheel Club v. Travellers' Ins. Co.*, 78 Conn. 355, 62 Atl. 207.

Sec. 297. Eviction. Under a lease of rooms for an art studio the lessee is not liable for rent after constructive eviction by the renting of lower rooms to an automobile company whose operations caused such shaking of her rooms as to make them unfit for a studio, *Wade v. Herndl*, 127 Wis. 544 107 N. W. 4. Where a landlord unlawfully evicts a tenant the latter can recover as damages any excess of the rental value over the price he agreed to pay together with any other loss directly caused by the removal including the cost of removal to another place, *McElvaney v. Smith*, 76 Ark. 468, 88 S. W. 981. Lessor's notice to a lumber company that his lessee, who ordered

lumber for the completion of a shed necessary for the beneficial use of the premises, was not the owner of the premises and that the lessor would not pay for it does not amount to an eviction, *Buhler v. Smith*, 130 Wis. 488, 110 N. W. 412. A landlord endeavored to forcibly eject a tenant who held an unexpired lease and tear down the building, and he employed contractors to pile building materials around the house in such a way as to cause the plaintiff's tenants to leave and to force her to vacate. The landlord was liable for damages, including the expense of maintaining guards by the plaintiff to prevent a forcible ouster, as well as the injury to the plaintiff's health on account of the anxiety, *Gray v. Linton*, (Colo. 1907) 88 Pac. 749.

Sec. 298. Termination of tenancy—Rights of parties on—Change or destruction of premises—Notice to quit. Tenant entitled to return of improvements made on faith of verbal agreement for a lease, *Poole v. Johnson*, (Ky. 1907) 101 S. W. 955. The following clause in a lease: "If the lessor or his assigns shall decide at any time to remove the buildings on the leased premises, he or they may terminate this lease by paying to the lessee the sum of twenty-five hundred dollars" is not a covenant to pay \$2500 as liquidated damages in case the lessor evicts the lessee or terminates the lease, but is a clause conferring on the lessor the privilege of terminating the lease by paying the lessee \$2500. Where the landlord's assignee therefore tore down the building, the tenant's only right is to sue for damages caused by the eviction, *Harrison v. Jordan* 194 Mass. 496, 80 N. E. 604.

Landlord's duty to relet. A lease contained a provision for re-entry on breach of any covenant, with the further clause: "And thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized." Held—Under this clause the lessor must use reasonable efforts to prevent unnecessary loss or diminution of rent by securing a new tenant if possible. *International Trust Co. v. Weeks*, 203 U. S. 364.

Change or destruction of premises. Kentucky Statutes 1903 section 2297 as to the liability of a tenant for future rent under a lease after a destruction of the premises by fire con-

strued, *Scott Bros. v. Flood's Trustee*, (Ky. 1907) 99 S. W. 967. A tenant is justified to accept premises leased by him if they have been substantially changed in character, *Rosenstein v. Cohen*, 96 Minn. 336, 104 N. W. 965. Where a fire has totally destroyed a building, a notice sent by tenants holding from year to year that "We beg to advise that we have vacated the premises. . . . destroyed by fire Sept. 15th last, and hereby surrender possession of the same", is not a sufficient notice to quit and the tenant is liable for rent accruing after the end of the current year, *Arbenz v. Exley Watkins & Co.*, 57 W. Va. 580, 50 S. E. 813. Where the landlord brings suit to recover arrears in rent, and the evidence shows that the premises were rented in order to keep a rival company out of business, and that the destruction of the wharf on them was the result of the neglect of ordinary care on the part of the tenant, and that the premises had been vacant for two years and the tenant claims a reduction in rent equal to the diminished value of the premises for his purposes on account of the destruction of the wharf, the finding was for the plaintiff, the value of the premises not having been diminished for the purpose of the plaintiff, *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 49 S. E. 650.

Notice to quit. Form of notice at or after termination of lease and method of procuring hearing on complaint by owner prescribed by Conn. Acts 1907, Ch. 41. Where the notice to vacate the premises was served on the wife of a tenant who could not read, it was a sufficient compliance with Gen. Laws 1896, c. 269, sec. 4, although she did not tell her husband of the service, *Cranston Print Works v. Whalen*, 27 R. I. 445, 63 Atl. 176. A verbal contract for a five year rental of a farm is within the Kentucky Statute of Frauds. A month's written notice to vacate is all the owner need give the tenant, *Poole v. Johnson*, (Ky. 1907) 101 S. W. 955. A purchaser at a tax sale was not compelled to serve notice or make a demand for possession on tenants holding the property under a lease from the previous owner, before he brought an action of ejectment against them, as the relation of landlord and tenant did not exist, *Carlson v. Curran*, 42 Wash. 647, 85 Pac. 627. Comp. Laws of New Mexico of 1897, sec. 3347, relating to a notice to quit from the landlord, was construed not to necessitate the signature of the notice to quit by the landlord, provided it

was definite enough so the tenant knew from whom it came, *Lund v. Ozanne*, (N. M. 1906), 84 Pac. 710.

A notice to quit must be given by a landlord personally, or by his duly appointed agent. If by the agent, it must appear that he is clothed with power to give the notice at the time it was given. Ordinarily a subsequent ratification of an agent's act by the principal will be sufficient, but between landlord and tenant the rule with regard to the notice differs from that which governs between principal and agent as to other transactions, *Barnewell v. Stephens*, 142 Ala. 609, 38 S. 662.

Sec. 299. Surrender. After abandonment of premises by a tenant, the landlord took possession, occupied a small portion himself and rented the rest for a term exceeding the balance of the existing lease. Held—The lease was rescinded, *Hagoods v. Johnston*, 97 Minn. 289, 106 N. W. 304. A surrender of leased premises and its acceptance by the landlord, following a statement by him that the lessees might go if they would get a man as good as they were, estops the owner from collecting further rent under the lease, *West Concord Milling Co. v. Hosmer*, 129 Wis. 8, 107 N. W. 12. A lease of land commencing in October provided that if the land were submerged on account of imperfect reclamation before June 1st that the lessee could cancel the lease. The land was submerged in February and the lessee gave written notice cancelling the lease, and as the agricultural work had been profitless as it consisted in preparing the land for cultivation, the lessee was not liable for the semi-annual rent due on April 1st, *Donnellan v. Wood, Curtis & Co.*, (Cal. 1906) 87 Pac. 235. A lease provided that if the tenant held over a year that it should be regarded as a renewal of the lease for another year, and so on until either party should give three months' notice of their intention to terminate the lease at the end of a year. The lessee was notified by the city that it would take a part of the premises and he notified the lessor that as it would be necessary for the city to take a part of the premises that he would have to vacate the property, and "after that date we will together have a claim against the city of Philadelphia for this rent." As this was not a positive notification by the tenant that he should surrender the premises on a fixed date so that the landlord would be authorized to relet the premises to another tenant, it was not a sufficient notice of the termination of the tenancy,

and the tenant was liable for the rent accruing after the partial taking by the city. *Fotterall v. Armour*, (Pa. 1907) 66 Atl. 1001.

Sec. 300. Farming on shares—Rights to crops—Manure. A contract providing that one person shall work land and shall have half the crop, less debts owed the landowner, is one of employment and not of hiring, *Bourland v. McKnight & Bro.*, 79 Ark. 427, 96 S. W. 179. When the plaintiff's minor son contracted with the defendant to work the latter's farm "on halves," each party furnished one-half of the fertilizers, a contract of hire was not created within the meaning of Alabama Code 1896, section 2712 but a tenancy in common of the crops grown, *Hendricks v. Clemmons*, 147 Ala. 590, 41 S. 306.

Rights to crops. When a landlord refused to surrender the share of crops belonging to a deceased tenant, to his widow, she was entitled to sue for conversion, and to her husband's rightful share, less the cost of harvesting, *Parker v. Brown*, 136 N. C. 280, 48 S. E. 657. A sublessee of a life tenant is not entitled to defend an action for possession by the remainderman brought after the death of the life tenant on the ground that he had planted crops on the premises in question; his only right is to enter to cultivate and harvest them, *Edghill v. Mankey*, (Neb. 1907) 112 N. W. 570. Under the terms of a lease contract the lessee was to have the privilege of cultivating such land as was suitable for the planting of crops. It was held that he was also entitled to the enjoyment of the fruit of the trees growing on the rented premises and maturing during the tenancy, unless the fruit was excepted in the agreement to rent, and by mutual mistake was left out of the written contract. *Quiggle v. Vining*, 125 Ga. 98, 54 S. E. 74. Under Civ. Code 1895, §3129, a cropper who delivered to his landlord portions of a cotton crop at divers times, and instructed the latter to sell the cropper's share at the time of each delivery, which the landlord failed to do till some time subsequently, thereby causing great loss by reason of depreciation in the price of cotton, cannot recover, *Goodson v. Watson*, 125 Ga. 413, 54 S. E. 84.

Manure. If a lease is given a tenant for agricultural purposes and he agrees to pay partly in produce, the tenant is

not allowed to remove the manure at the conclusion of his lease, *Roberts v. Jones*, 71 S. C. 404, 51 S. E. 240.

Sec. 301. Landlord's lien—On crops. A landlord "does not owe the tenant the duty of enforcing his lien against all or any specific portion of the property," *Citizens' Savings Bank of Olin v. Woods*, 134 Ia. 232, 111 N. W. 929. Under Kirby's Arkansas Digest sections 5032 and ff a landlord's lien does not cover damages for neglect of the crop and rental value of lands not cultivated, *Few v. Mitchell*, 80 Ark. 243, 96 S. W. 983. A landlord has no lien on the proceeds of the sale of the stock of his tenant which have been paid by the purchaser to trustees for the benefit of the tenant's creditors, *Hartwig v. Iles*, (Ia. 1906) 109 N. W. 18. Where pending a suit by a landlord for overdue rent the tenant is adjudicated a bankrupt the suit does not ipso facto abate but should be allowed to proceed to judgment and the tenant's moveable property which has already been seized and is in the hands of the sheriff can be sold to pay the judgment, and the balance if any turned over to the trustee in bankruptcy. The privilege of seizure of the tenant's moveables is a lien which dates from the execution of the lease, not the actual seizure, and bankruptcy does not affect it unless the lease was entered within four months thereof, *Schall v. Kinsella*, 117 La. 687, 42 S. 221.

Landlord's lien on crops. Alabama Code 1896, section 2703, giving a landlord a lien on his tenant's crops, in certain cases, covers blacksmith's tools, *Holladay v. Rutledge*, (Ala. 1905) 39 S. 613. A landlord who advanced his tenant a sewing machine, and money to pay for pasturing, and gunning and reaping the cotton crop raised "on the faith of the lien", was entitled to a lien on the crop for such advances under Kirby's Arkansas Dig. 5033, *Earl Bros. & Co. v. Malone*, 80 Ark. 218, 96 S. W. 1062. Under Code Sec. 2992 a landlord has a lien on crops in the hands of a purchaser from a subtenant of the original lessee, *Beck v. Minnesota & Western Grain Co.* 131 Ia. 62, 107 N. W. 1032. Kentucky Statutes, 1903, ss. 2323 and 2324 as to the existence and enforcement of a landlord's lien upon the crop for money and property furnished the tenant, construed, *Marquess v. Ladd*, (Ky. 1907) 100 S. W. 305. Sec. 3057 Civil Code giving landlord lien on crops for rent and advances to tenant is amended by S. C. Acts 1906, No. 58. Tenants are forbidden to remove

crops until rents and advances are paid by Va. Acts 1906, Ch. 103. When an owner of land furnishes another a team and allows him to gather the crop as his tenant the owner has merely a lien on the crop for his share, and this he cannot mortgage, *Carleton v. Kimbrough*, (Ala. 1907) 43 S. 817. An attempt in a lease to charge crops to be grown with payment of rent is invalid and creates no lien, *Thostesen v. Doxsee*, (Neb. 1907) 110 N. W. 567. In Arkansas a landlord who goes surety on his tenant's note for a horse does not thereby acquire a lien on the crop for the price of the horse superior to that of a mortgage, *Kaufman & Willson et al. v. Underwood*, (Ark. 1907) 102 S. W. 718. A landlord's lien under a simple rent contract is in Mississippi superior to the claim of the beneficiary in a deed of trust given by the tenant on his crops to secure advances for supplies made during the tenancy, *Bedford v. Gartrell*, 88 Miss 429, 40 S. 801. Sec. 2494 Code, providing a method for establishing liens on crops for advances to farmers, is amended by Va. Acts 1906, Ch. 45.

A landlord, who wrote a merchant that if the latter would make advances to the tenant the landlord would make him (i. e. the tenant) no advances and hold the crop only for the land rent, as against the merchant, cannot increase the amount of rent due by adding a balance from the previous year, *Beattie v. Hughes & Mercer*, (Ark. 1907) 101 S. W. 170.

Section. 302. Rent.

Rents while mortgagee is in possession, see *post*, §411.

Under Alabama Code of 1896 a landlord's claim for rent may be assigned and the assignee acquires all the landlord's rights, *Bennett v. McKee*, 144 Ala. 601, 38 S. 129. Mississippi Chapter 52, pp. 44, 45 acts 1894 does not subject the property of third persons on leased premises to liability for rent, *Brunswick-Balke-Collender Co. v. Murphy*, 89 Miss 264, 42 So. 288.

Where a contract between landlord and tenant provides that a certain sum be paid as rent for land and another certain sum be paid as hire of animals to be used on the rented premises, the whole sum due is rent and may be collected, *Sapp v. Elkins*, 125 Ga. 459, 54 S. E. 98. In a suit for the recovery of rent the lessor based his claim upon a written lease for certain hotel premises, one of the terms being absolute con-

trol of the premises by the defendants. Trespasses by the lessor on the leased premises in placing guards at the gates to the fence around the leased premises and other acts whereby the business of the lessee was destroyed, were directly connected with the contract of the lease and the defendant has the right to assert a claim for damages under Code 1887, par. 3299, (Va. Code 1904, p. 1740), for breach of contract as an offset, *Newport News & O. P. Ry. & Electric Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011.

Amount. Where a lease provides that A guarantees that the gross receipts of his business shall be at least \$10,000. per year, and A agrees to pay B and C 20 per cent. on the difference between the actual receipts and \$10,000. and B and C are to retain 20 per cent. of the gross receipts as full compensation under the lease, it is a lease for \$2,000. per year minimum, and when the gross receipts do not equal \$10,000. the lessors B and C are entitled to bring an action in ejectment if the rent of \$2,000. is not paid by the end of the year, *Shartenberg & Robinson v. Ellbey*, 27 R. I. 414, 62 Atl. 979.

Liability of third person. In a suit to recover rent due, where a third person promised payment and seeks protection under Code §1552 it must be shown that the debt is that of a third person, or if the creditor is accepting the obligation or promise of the defendant and in consideration therefor, has released the person who was the original debtor, or the statute has no application, *Sheppard v. Newton*, 139 N. C. 533, 52 S. E. 143.

Action for. It was held that in accordance with the Arkansas Constitution 1874, article 7, section 40 "the jurisdiction of a justice of the peace, in an action brought by a landlord to recover rent due upon contract, cannot be defeated by the defendant controverting the plaintiff's title to the land; but when there is no contract for the payment of rent, when the relation of landlord and tenant does not exist, and the plaintiff's right to recover depends entirely upon his title to the premises occupied by the defendant, then a justice of the peace has no jurisdiction," *Minton v. Minton*, 81 Ark. 192, 98 S. W. 976.

Distress. Under the Illinois Landlord and Tenant Act which provides a distress for rent and a lien upon the crops for failure to faithfully perform the terms of a lease, although a lease provided for one-half of the crop as rent and further

stipulated that damages from poor husbandry should be added as part of the rent a distress warrant could not issue to recover such damages, *Bates v. Hallinan*, 220 Ill. 21, 77 N. E. 115.

Sec. 303. Repairs.

A tenant had a lease of wharf property and all water rights pertaining thereto, but he was not compelled to clean the dock between the two piers of his wharf when he had not expressly covenanted to do so as that duty rested on the owner by law, *Haley v. A. A. C. Co.*, (Pa. 1907) 66 Atl. 559. An officer of a tenant corporation cannot maintain an action against the landlord for failure to maintain in safe condition, in accordance with statutory requirements an elevator which is part of leased premises, for the reason that he, as officer of the lessee, was in the absence of express agreement in the lease, under an equal obligation with the landlord to maintain the elevator in proper condition, *Welker v. Anheuser-Bush Brewing Co.*, (Minn. 1908) 114 N. W. 745.

Custom as to duty to repair. In an action by a person who lived with a tenant holding under an oral lease, evidence is admissible to prove a custom or usage in the city where the property was situated, by which when houses are entirely let without any written lease to a single tenant at will, the owner does the outside repairs. But evidence of a custom that the landlord retains control of the outside, yard and roof, is inadmissible. A jury may infer from evidence that after the landlord's carpenter repaired the roof a leak still continued that the repairing was negligently done, and the landlord may therefore be held liable to the plaintiff for injuries due to a fall upon the front steps caused by ice which formed after the leak, *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96.

Liability for failure to make repairs or negligence in making them. Where a tenant can recover damages against his landlord for personal injuries, a member of his family living with him can, *Domenicis v. Fleischer*, 195 Mass. 281, 81 N. E. 191. The statement of a landlord to his tenant: "You can use the porch. It is all right. It is perfectly safe;" held to be a warranty of future condition, *Onsley v. Hampe*, 128 Ia. 675, 105 N. W. 122. A landlord who authorizes one tenant to construct a porch is liable to another tenant of the same building for injuries due to faulty construction, *Myhre v. Schlender*,

98 Minn. 234, 108 N. W. 276. Where a landlord, who had leased the floors of a building under a lease whereby he was to keep the roof in repair but was liable for damages due to leakage of the roof only in case he failed to make necessary repairs after receiving a written notice of the leakage, permitted the use of the roof by a corporation for purposes which were likely to render it leaky, with knowledge that the roof was not suitable for the uses to which the corporation intended to put it, he was liable for the damage caused although the tenant gave him no written notice, Pratt, Hurst & Co. v. Tailer, 186 N. Y. 417, 79 N. E. 328. Where a landlord remodeled premises occupied by a tenant and a sub-contractor was negligent in his work so the tenant's goods were damaged, the owner was liable for damages to the tenant as a covenant for peaceable possession and quiet enjoyment of the premises was implied in the relation of landlord and tenant. Bancroft v. Goodwin, 41 Wash. 253, 83 Pac. 189. The lessee of an upper story can sue the landlord for damages caused by sending workmen into her premises without her consent who tore up the floor and lowered the height of the rooms. She was entitled to possession and to be the judge of whether or not the repairs were advantageous to her. The action is not "ex contract" but "ex delicto", Wood v. Monteleone, 118 La. 1005, 43 S. 657.

A building was condemned by the building inspector and the lessee tore it down and rebuilt it pursuant to his orders. The lessor was liable for the repairs which were necessary, although the lease provided that the lessee should make all repairs and surrender the property in as good condition as he received it. When the parties agreed among themselves that the lessees should rebuild and pay the stipulated rent each month subject to the decision of the court in disputed matters there was no estoppel raised against the lessees because of such rebuilding. Fire shutters when not ordered by the building inspector could not be charged against the lessor, Clark & Stevens v. Gerke. (Md. 1906) 65 Atl. 326. Wilson's Rev. & Ann. St. 1903, sections 863, 864, providing that a landlord must put a building which is for "the occupation of human beings in good repair and maintain it in good condition while leased," was construed not to require a landlord to repair a building leased for printing and publishing a newspaper

when there was no provision requiring repairs in the lease, *Tucker v. Bennett*, 150 Okl. 187, 81 Pac. 423.

Building in possession of various tenants. A landlord owes a duty to his tenant to care for and repair a stairway over which the tenants have only a right of way in common, and which is kept in control of the landlord, but the tenant impliedly agrees that he will take the arrangement and mode of construction as they manifestly are, and will not call for any change to relieve from obvious dangers, *Andrews v. Williamson*, 193 Mass. 92, 78 N. E. 737. A petition in a suit by a tenant of the upper story of a two floor apartment house for damages to her furniture due to the building falling down because structurally insecure, which alleges that the ground floor was occupied by other tenants but contains no allegation that the landlord knew of, concealed or warranted against such defective condition, states no cause of action against the landlords: although it was stated that the landlords retained possession and control of the walls and foundation, the pleadings show that the entire possession had been parted with, *Miles v. Tracey*, (Ky. 1906) 89 S. W. 1128.

When action accrues. Where an agreement existed between a landlord and tenant, whereby the tenant was to furnish certain repairs and divers improvements, lumber and labor, and various other matters, upon the premises rented, for which the tenant was to be reimbursed by the landlord and where there was an understanding that the account should become payable at the date of the removal of the tenant from the property and the giving possession thereof to the landlord, the statute of limitations against the account does not begin to run until such removal and surrender has taken place, *Busby v. Marshall*, 125 Ga. 645, 54 S. E. 646.

Sec. 304. Landlord's failure to repair as defence to action for rent. Where a property is in bad condition at the time of renting and the tenant has had equal opportunity with the landlord for examining it, he cannot set up the damages caused by failure to make repairs as a defence to a distress warrant for the collection of the rent, when no demand for repairs has been made, although the tenant would have discovered that they were necessary by the exercise of due diligence, *Henley v. Brockman*, 124 Ga. 1059, 53 S. E. 672. The right of a lessee under the Louisiana Code, section 2694 to re-

tain rents for the purpose of making indispensable repairs does not exist until after notice to the lessor to make such repairs and his refusal and applies only to rents subsequently accruing, *Mullen v. Kerlec*, 115 La. 783, 40 S. 46. Where the condition of a brick wall in a leased storehouse made it dangerous to life and property and its reconstruction necessary on the part of a lessor the lessee can recover his actual and direct pecuniary loss due to the work of repairing it in addition to the reduction of rent provided by Article 2700 of the Louisiana Civil Code, *Lazare, Levy & Co. v. Madden*, 116 La. 374, 40 S. 766.

Section. 305. Actions between tenants. A lease of "the store numbered.....with the basement under the same and the room numbered 26 on the fourth floor" left the vestibule and stairway in the possession and control of the lessor but entitled the lessee to the unobstructed use of a window facing the vestibule which was of much value for advertising purposes. An obstruction thereof by another tenant, therefore, was a trespass and the removal of the obstruction lawful, *Whitehouse v. Aiken*, 190 Mass. 468, 77 N. E. 499.

Sec. 306. Rights and liabilities between landlord, tenant and third party. In Missouri where actual tenants of land are notified of an attachment ten days before the return of the writ they may apply for a review of the judgment when recovered, *Miners' Bank v. Kingston*, (Mo. 1907) 103 S. W. 27.

A tenant's attornment to a third party, without notice to the landlord, does not destroy the latter's possession so as to defeat an action of trespass *quare clausum fregit*, *Buford v. Christian*, (Ala. 1907) 42 S. 997.

Criminal liability. Under a municipal ordinance providing that the owner or occupant or other person in control of premises shall be punished for nuisance, a landlord cannot be held liable where tenants were in possession under a lease for 5 years with no covenants as to condition of premises or repairs, *People v. Kent*, (Mich. 1908) 114 N. W. 1012.

Tenant v. landlord. Tennessee Acts 1899, p. 352, c. 178, section 2, providing that certain innkeepers shall provide fire escapes is not applicable to the owner of a hotel operated by a lessee, *Adams v. Cumberland Inn Co.*, 117 Tenn. 470, 101 S. W. 428. A landlord renting property to tenants in an office

building is not required to keep the door to the building open on Sunday, and if an unexpected fire occurs he is not liable for the destruction of a tenant's furniture because the door was not open and the tenant was unable to remove his furniture through the large door on the second story, when it is not shown that the landlord or his agent knew of the tenant's desire to do so, *Whitcomb v. Mason*, 102 Md. 275, 62 Atl. 749.

Tenant v. third party. A lessee although under no obligation to repair may recover against a third person damages to the buildings to the extent of the lessee's interest therein, *Moeckel v. C. A. Cross & Co. Inc.*, 190 Mass. 280, 76 N. E. 447. A lessee during the period of his term, has all the rights, as to ingress and egress and as to obstruction or interference therewith, that the owner in fee would have, except as to the extent of damages, *Coleman v. Holden*, 88 Miss 798, 41 S. 374.

Third party v. landlord. A landlord is not liable to a third person for injury due to a fall into his coal hole seven months after the property was leased unless she shows that it was in a defective condition at the time of the lease, *Clapp v. Donaldson*, 195 Mass. 39, 80 N. E. 486. A lessor had granted the right to construct a certain road across his land to be built at a certain definite grade, and he then leased the right to quarry stone to his lessee granting to the lessee the right to take away so much stone that the lateral support of the road was removed and the road was damaged. The lessor was liable for damages, *Board of C. F., Hudson County, v. Woodcliffe Land Imp. Co.*, (N. J. Err. & App. 1907), 65 Atl. 844.

LEASES

Tenant's rights to improvements, see *ante* §259.

As to oil and gas leases, see *post* OIL AND GAS.

Sec. 307. What constitute—Existence—Authority to make—Parol lease. A contract binding the owner to rent land to be paid for in three instalment notes with a provision that if all are paid he would convey to the other party, was a lease not a sale, *Thomas v. Johnston*, 78 Ark. 574, 95 S. W.

468. A lease for value conveying timber and a right of way for the purpose of exercising the right of boxing for turpentine under which the parties were placed in possession was not a mere license revoked by the death of the party granting it, but a valid lease, *Gex v. Dill*, 86 Miss. 10, 38 S. 193. A deposit was made to show good faith that the lessee would enter into the possession of the premises for three years at a stipulated rental, but when the lessee refused to accept a tender of the keys to the premises after the lessor had signed the lease and left it with the lessee's agent, the lessor had no right to enforce a compliance with the lease, but he could only retain the deposit, *Schlumpf v. Sasake*, 38 Wash. 278, 80 Pac. 457. A city ordinance allowing certain street railroads and their successors and assigns to sell or lease their property to certain other companies, authorizes a purchaser to so lease it without the special consent of the city in spite of Missouri Constitution, Art. 12, Sec. 20. The lease as executed did not constitute the relation of principal and agent between the parties thereto and the lessor, therefore, is not liable to a passenger for the negligence of the lessee, *Moorshead v. United Rys. Co.*, (Mo. 1907) 100 S. W. 611.

The conditions under which a landlord may change the terms of a lease are prescribed by Cal. Stat. 1907, Ch. 39. Amending Sec. 827 of the Civil Code.

When an officer of a corporation makes a lease in his own name without authority, the lease is valid if the rent is accepted by the company if it is proved that the other officers must have known of the existence of the lease, and the acceptance of the rent with knowledge of the lease amounts to ratification and is an effectual bar to an action for ejectment, *Clement v. Young-McShea Amusement Co.*, 69 N. J. Eq. 347, 60 Atl. 419.

Parol lease. When in a preliminary agreement for a lease of land it is stipulated that the lease shall be reduced to writing either party may withdraw before the lease is actually signed, *Woodville In. Re.*, 115 La. 810, 40 S. 174. A lease void within the Statute of Frauds cannot be set up by a defendant any more than it can be sued on by a plaintiff, *Simons v. New Britain Trust Co.*, (Conn. 1907), 67 Atl. 883. The act of a person who had orally leased a house beginning on the 1st of the next month, in moving part of his goods in and then moving them out again before that date did not make

him liable for the rent, *Matthews v. Carlton*, 189 Mass. 285, 75 N. E. 637. Where a person takes possession under a verbal agreement with the owner to pay a certain definite sum monthly "in the nature of rent" and when the whole is paid to receive a deed thereof, but fails to make the payments as agreed, the owner may maintain unlawful entry and detainer against him, *Clark v. Bourgeois*, 86 Miss. 1, 38 S. 187.

Sec. 308. Construction of covenants in—Implied covenants. Where a lease granted A the right to cut "ten acres of woodland on lot 158-3 and 23",.....and "the refusal of the farm at same price and privileges for the years 1904, 1905 and 1906", it was construed not to grant A the right to cut 10 acres of woodland a year, *Jones v. Gammon*, 52 Ga. 47, 50 S. E. 982. A covenant in a lease of a railroad that the lessee should pay the interest on the lessor's bonds but that the lessor should not issue additional bonds does not prevent the lessor from issuing new bonds to pay the old ones. Such a covenant if intended to restrict the lessor's right to mortgage its reversion was void, *Continental Ins. Co. v. N. Y. & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026. A lease of a laundry contained a covenant to furnish lessee "with right to connect with sewer drain at rear of store building with drainage and fall sufficient to carry off water." Held—This required the lessor to furnish a drain suitable for a laundry and his failure to do so justified the lessee in leaving and relieved him from liability for rent. *Marks v. Chapman*, (Ia. 1907) 112 N. W. 817.

Subtenants act. Where a lessor under a covenant not to lease any part of his premises for a commissary, leases a part of the premises for a camp, and the holder of the sub-lease opens a commissary in the camp, the lessor is not liable for breach of covenant, *Luzente v. Davis*, 101 Md. 526, 61 Atl. 622.

Fitness. A lease of a theatre building does not imply a warranty that it is fitted for a theatre and where it contains no covenant by the lessor to provide adequate entrances and exits the lessee, in an action for the rent, cannot recoup damages caused by an order of a city building inspector providing that the lessee build additional means of egress in case of fire or panic. The lessee having remained in possession a constructive eviction by the landlord is no defence. The lessee's remedy upon a subsequent contract by the lessor to provide such additional means of egress is by an independent suit or

counter claim for the damages in case of its breach, *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 203. An oral agreement that a lease shall not be effective if the premises are not so built as to be suitable for the tenant's purpose is not waived by the tenant's remaining in reliance upon the landlord's promise to make alterations, *Hinsdale v. McCune*, (Ia. 1907) 113 N. W. 478.

Taxes. A covenant in a lease whereby the landlord agreed "to save the lessee harmless from all taxes, assessments, and betterments levied upon said premises until the termination of the lease" referred simply to the land as it was at the time of the execution of the lease, not to buildings afterward placed thereon by the lessee. The amount of the whole tax in excess of that on the land alone when paid by the lessor can be recovered back by him from the lessee, *Phinney v. Foster*, 189 Mass. 182, 75 N. E. 103.

To furnish steam. Where the owner of a building suitable for two tenants first leased the part containing the boiler plant for furnishing heat, light and power for the entire building and then leased the other part under a lease by the terms of which the lessee agreed to pay to the other lessee one-half of the cost of operating the boiler plant, it was held that the lessor did not by implication covenant to furnish steam for the lessee, *New Era Mfg. Co. v. O'Reilly*, 197 Mo. 466, 95 S. W. 322.

To leave premises in good condition. If a broken plate glass window in leased premises was due to a defect in the construction of the building it was within the exception to a covenant in a lease to leave the premises in as good condition as when taken, ordinary wear excepted, *Drouin v. Wilson*, (Vt. 1907), 67 Atl. 825. In an action by a landlord against his former tenant on a covenant to deliver up the premises in as good condition as they were when rented on the ground that they were infested with cockle burrs the measure of damage is the depreciation in rental value during the time necessary to eradicate the burrs plus the expense of so doing, *Brown Land Co. v. Lehman*, (Ia. 1907) 112 N. W. 185.

Sec. 309. Extrinsic evidence as to construction of. Where by the terms of a lease a buffet was allowed, parol evidence was admissible to show whether the parties to the contract intended the term buffett to convey the right to sell

liquor or not, *Pine Beach Inv. Corp. v. Columbia Amusement Co.*, 106 Va. 810, 56 S. E. 822. The lessor and lessee executed a signed lease containing no reference to a memorandum of repairs, which the owner promised to make, but oral evidence could not be introduced to prove the agreement for the repairs or that the memorandum about the repairs, which was not signed, was a part of the lease, as a written agreement was held to contain the whole contract of the parties unless it contained some reference in it to another instrument, *Hallenbeck v. Chapman*, (N. J. Law 1906) 63 Atl. 498.

Sec. 310. Renewal—Option to extend or purchase.

Where a lessee covenanted within 2 years of the lease to make certain improvements or build a new building, and the lease also contained a covenant for a 13-year renewal under a new lease which should contain a covenant in lieu of the renewal clause in the first lease that in case there should be standing on the premises a new building erected by the lessee the lessor would either buy the new building or grant a new lease for a third term; upon the expiration of the first lease the lessee having made the improvements on the old building but not built a new one was entitled to have the covenant specified inserted in the new lease, *Martin v. Babcock & Wilcox Co.*, 186 N. Y. 451, 79 N. E. 726.

An option for renewal in a lease to joint tenants must be exercised by both, otherwise the owner is entitled to possession, *Tweedie v. P. E. Olsen Hardware & Furniture Co.*, 96 Minn. 238, 104 N. W. 895. A lease provided that if the lessor should sell the property within nine months a provision for an extension should be void, but where the property was sold after the expiration of the nine months' time the lessee had a right to claim an extension of the lease according to its terms, and the purchaser had no right to exclude the lessee from the leased quarry by a fence, *Arkley v. Union S. Co.* 147 Cal. 195, 81 Pac. 509. When a tenant whose right to a renewal is dependent upon furnishing a good surety has stated that he cannot give any other than one whom the landlord had a right under the circumstances to refuse, the landlord is released from liability to renew and may lease to another tenant, *Piper v. Levy*, 114 La. 544, 38 S. 448. An option to renew is not exercised by the lessee's possession through a person employed to watch the land who did nothing but trim some trees

thereon, *Wright v. Kayner*, (Mich. 1907) 113 N. W. 779. A lease made it optional with the lessor to continue the lease for a second term upon six months' notice, and the lessor covenanted, if the lease was not continued, to pay the full value of the buildings erected by the lessee, or if the lessor should fail to pay, the lessee should hold over as tenant from year to year subject to the ordinary notice to leave at the end of the year, at which time the lessor should pay for the buildings. The lessee remained in possession after the first term; the notice of lessor's election to continue the lease was not given; the relations of landlord and tenant continued till after what would have been the second term had expired, when the lessor served due notice of the expiration of the tenancy and without paying for the buildings was entitled to possession, *Powell v. Pierce*, 103 Va. 526, 49 S. E. 666. Where a saloon keeper was a tenant of a brewing company and under his lease could only exercise his option to renew upon sixty full days' notice, the fact that the first day of the sixty days fell upon Saturday, a legal half holiday, followed by two consecutive whole holidays; did not give the tenant a right to give his notice on the Tuesday following. The landlord's advertisement that the tenant dealt exclusively in the landlord's beer does not estop the landlord from granting a renewal. It appeared prior to the time of renewal and the fact that it was not taken out of the newspapers after the expiration of the lease is immaterial, *Jackson Brewing Co. v. Wagner*, 117 La. 875, 42 S. 356. Where a coal lease provided for certain payments if not renewed but was silent as to how long the renewal should be for and the parties continued to operate without objection after its expiration according to its terms, it may be presumed that there was a satisfactory renewal agreement the existence of which both parties were estopped to deny, *Wallace v. Dorris*, (Penn. 1907) 67 Atl. 858.

A lease for a year with an option in the lessee to extend the lease for one or two years on the same terms is a lease for one, two or three years upon his option, and after its exercise rent accruing accrues thereunder and passes to the lessor's assignee of rent to accrue under the lease, *Swan v. Inderlied*, 187 N. Y. 372, 80 N. E. 195. A tenant leased premises for five years with the option to have an extension at the same yearly rental at the end of said first term of five years for another full term of five years. But when the tenant

did not exercise his option for a continuance of the lease before its expiration or pay the year's rent in advance in accordance with the terms of the lease, the landlord had a right to possession of the premises and he was within his rights to refuse a tender of the rent after the expiration of the lease, *Atlantic Product Co. v. Dunn*, 142 N. C. 471, 55 S. E. 299.

Option to purchase. When a lease includes "the refusal of buying it next fall for the sum of \$6.00 per acre" the lessee may compel specific performance of the contract, when a definite description of the place is given so that parol evidence may completely identify it, *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436. When a definite oral lease of land is made with a provision that the lessee shall have the privilege of purchasing the property as soon as the title is perfected, and the purchaser goes into possession, and builds a fence around the property and pays \$100. as the first year's rent, the oral contract is not within the statute of frauds and a bill for specific performance may be ordered, *West v. Washington & Columbia R. R. R.* (Ore. 1907) 90 Pac. 666. Where a building was erected by a tenant under a lease by the terms of which the lessor at its expiration was to buy it or grant a new lease and a new lease was granted upon the same terms, but at its expiration a third lease was made omitting the clause about purchase, the building passed to the lessor upon the execution of the third lease and his rights thereto were not affected by a 30 days' extension. The agreement at its expiration was made "without prejudice to any rights to the parties hereto under the terms of said lease," *Precht v. Howard*, 187 N. Y. 136, 79 N. E. 847. When a lease provides that the lessee shall have the right to purchase at the end of a year for \$2,000. and it further provides that "This agreement with all its provisions and covenants shall continue in force from term to term, after the expiration of the term above mentioned" etc., the lessee may compel specific performance of the option to purchase at the end of the first year or at the end of any succeeding term as long as the provisions of the lease remain in force, as the option to purchase is a continual obligation running with the lease, *Thomas v. Gottlieb B. S. Brewing Co.* 102 Md. 417, 62 Atl. 633.

Sec. 311. Subletting. "Where there is no covenant against subletting, a lessee has a right to sublease all or any part of the

leased premises, and when he does so he cannot by a surrender of the leased premises to the lessor defeat the rights of his undertenant", *Mitchell v. Young*, 80 Ark. 441, 97 S. W. 454. A lease contract without the privilege of subletting is not confined to the first year's occupancy but to each following term, where the lease has been extended at the instance of the tenant. *Walker v. Wadly*, 124 Ga. 275, 52 S. E. 904. A provision, in a lease of lodge rooms, against leasing to any other lodge without the vote of two-thirds of both lessor and lessee lodges is not waived by the occupancy, by common consent, of the rooms by lodges affiliated with each, *Portage Granger v. Portage Lodge*, 141 Mich. 402, 104 N. W. 667. Where the plaintiff with the consent of the owner of the fee obtained from a tenant a lease of part only of his term, he was a sub-lessee, not an assignee, and upon a forfeiture by the tenant the sublease was terminated. Where the original lease was for mining purposes and authorized a forfeiture in case the tenant failed to maintain sufficient pillars to properly support the mine such a clause was a condition, not a mere covenant, and if violated, defeated the tenant's estate at the owner's election. When the lease provided for notice of forfeiture by mail to the lessee, but set no term, a peaceable re-entry by the owner immediately after the mailing of the notice terminated the lease. The sub-tenant having in good faith given up possession to the paramount title was thereby evicted and could maintain an action against his lessor for breach of the implied covenant of quiet enjoyment, *Geer v. Boston Little Circle Zinc Co.*, (St. Louis Appeals 1907) 103 S. W. 151.

Sec. 312. Landlord's failure to give possession. There is an implied covenant in a lease that the lessee may have possession when the term begins and for breach of the covenant damages amounting to the difference between the rental value and the rent reserved may be recovered, *Herpolsheimer v. Christopher*, (Neb. 1907) 111 N. W. 359. It was held that when a valid contract for the lease of a farm is entered into, and the lessor refuses to place and keep the lessee in possession according to the terms of the lease, the measure of damages the lessee is entitled to recover for the breach of contract is the difference between the price he agreed to pay and the actual rental value of the property, together with such special damages as he has sustained, *Devers v. May*, (Ky.

1907) 99 S. W. 255. In a suit for a breach of a covenant in a lease of business rooms, where the lessor tendered possession of the premises to the lessee less than four months after the date on which the lessee was entitled to possession but which it declined to accept, and also refused a tender of the advance payment of one month's rent, the lessor's breach, unless waived in some way, will defeat any remedy he may invoke for the enforcement of his contract, as the lessee is not bound to take possession. He may stand upon his contract and recover damages for the breach, *Huntingdon Easy Payment Co. v. Parsons*, (W. Va. 1907), 57 S. E. 253.

Sec. 313. Assignment or succession in interest. A person who acquires the whole estate of a lessee in a portion of the premises covered by the lease is an assignee, not a subtenant, and is entitled to the benefit of the landlord's covenant to pay for the improvements made thereon by the tenant or his assigns, *Hollywood v. First Parish*, 192 Mass. 269, 78 N. E. 124. A bequest by a tenant of his leasehold interest to his executors, and their transfer to themselves as trustees, was not a breach of a covenant not to assign the lease where the lease itself provides that the leasehold shall go to the lessee's "personal representatives" and the covenant not to assign binds the lessee" or others having his estate in the premises," *Squire v. Learned*, 196 Mass. 134, 81 N. E. 880. The assignee of a lease under which the lessees were to make all repairs needed or required by them which at the end of the term were "to revert to the owners" and which contained a further covenant by the lessees "to make improvements on said premises to the value of at least one thousand. . . . dollars during said term, and to leave the same therein at the end of said term if they do not purchase the premises," was bound by the covenants, *Peters v. Stone*, 193 Mass. 179, 79 N. E. 336. An assignee of a leasehold is liable by reason of privity of estate for the rent accruing during the time he was the owner of the leasehold interest, but he may destroy this privity by reassignment to the original lessee thereof without notice to the lessor even where there is a covenant against assigning it without the lessor's consent, *Donaldson v. Strong*, 195 Mass. 429, 81 N. E. 267. Where a company assigns the right to mine asphalt to another company and its stockholders are practically the stock-

holders of the new company, the lessor has a right to an action against both companies for royalties, although the new company maintains that it is not liable as the lease had not been assigned to it, *Higgins v. California P. & A. Co.*, 147 Cal. 363, 81 Pac. 1070.

Sec. 314. Termination—Forfeiture—Perpetuity—Redemption. When a written release duly acknowledged and accepted by the plaintiff is set up as a defence to a suit for the breach of a lease, it is valid even when only a copy of it is found, and the evidence showed that the plaintiff had lost his interest in the lease, *Conant v. Jones*, 120 Ga. 568, 48 S. E. 234. When a lease stipulated that the lessor should have the right to terminate the lease in case of a sale of the premises on sixty days' notice, the purchaser had a right to terminate the lease although the words lessor "or assigns" were not included, *McClung v. McPherson*. 47 Or. 73, 81 Pac. 567. Where a lease contained an agreement to vacate within a reasonable time after sale of the premises the purchasers could properly give a 30 days' notice and when this was given on April 23, and rent was later accepted for May the reasonable time expired June 1. As to this the time necessary for the lessee to get a house of like size on a similar lot was immaterial, *Cooper v. Gambill*, 146 Ala. 184, 40 S. 827.

Where a tenant made improvements upon an oral understanding that his term should be extended five years after the termination of his existing lease and later the parties executed a written agreement granting an extension, subject to all the terms of the original lease which contained a clause giving the lessor the right after notice to cancel the lease upon certain terms, the written agreement controlled the oral negotiations and gave the landlord the right to terminate the lease in the manner provided by the original lease, *DeFriest v. Bradley*, 192 Mass. 346, 78 N. E. 467.

In an action for rent the defendant, the lessee under a lease in writing of plaintiffs' premises, before the expiration of the lease gave plaintiffs notice that he would quit the premises, by causing a formal written notice to be read, but not delivered to the plaintiff. In pursuance of the notice the defendant left the premises, and the plaintiffs entered upon and occupied them. Plaintiffs contended that the written notice was inadmissible, not purporting to be a remission of the

lease, but the court held that the plaintiffs having accepted the notice without objection, and having taken possession when the defendant left, there was an executed oral agreement within the meaning of a statute providing that a contract in writing might be rescinded by an executed oral agreement, *Stott v. Chamberlain*, (S. D. 1908) 114 S. W. 683.

Covenants by the lessee to surrender the premises at the end of the term and to give 30 days' notice of intention to vacate at the time, in default of which latter the owner might continue to lease for another year mean that the premises must be surrendered at the time recited on the lease unless it is extended under the provision for notice, *Trainor v. Schutz*, 98 Minn. 213, 107 N. W. 812.

Demand unnecessary. A lease providing for a fixed amount of rent, payable in advance and at a given place, and for a forfeiture for non-payment is forfeited, if the rent is not paid, without demand, *Union Scale Co. v. Iowa Machinery and Supply Co.*, (Ia. 1907) 113 N. W. 762.

Abandonment by tenant. When a lessee made a lease of certain premises agreeing to pay a royalty on all the brick manufactured from clay taken from the land he had a right to abandon the premises when the clay was exhausted before the expiration of the lease, although the lease provided that a royalty of \$200 per year should be paid or that the lessees should pay the difference between the amount of the royalty and \$200.00, *Adams v. Washington Brick &c. L. & Mfg. Co.*, 38 Wash. 243, 80 Pac. 446. After a tenant had abandoned a property before the expiration of his lease the landlord had a right to enter into possession of the property, make repairs and sublet it for as much as it would bring during the unexpired term of the lease and collect the difference from the lessee, including all expenses of letting and repairing, etc., *Higgins v. Street*, (Okl. 1907), 92 Pac. 153.

Waiver of forfeiture. Where a lease contains a provision that the landlord shall have a right to re-enter the premises if the rent is not paid, the acceptance of rent from the receiver of a corporation does not constitute a waiver of the right to re-enter the premises on account of the unpaid balance of rent, *Fleming v. Fleming Hotel Co.* of N. J. 69. N. J. Eq. 715 61 Atl. 157. A landlord who through the Board of Health notified a tenant to repair after the current rent had been paid but withheld a letter to him declaring a forfeiture of the lease

for failure to repair, and the tenant upon receipt of the notice from the Board of Health made the repairs in ignorance of the fact that the landlord had begun forcible detainer proceedings, forfeiture was waived, *Hasterlik v. Olson*, 218 Ill. 411, 75 N. E. 1002. A held a lease of a building from B. C purchased the lease subject to A's lease, and when the rent was overdue under A's lease, which provided that a forfeiture of the lease could be declared for non-payment of the rent, C declared a sub-lease to E forfeited for non-payment of rent. He received the rent on the day he declared the forfeiture and if he sent the notice after receiving the rent it was without effect, and if the notice was sent previous to the payment of the rent the subsequent acceptance of rent was a waiver of the forfeiture, *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. 948.

Perpetuity. When a turpentine lease failed to state when the rights granted thereunder should begin and end but work was actually started within 2 years it is not void as a perpetuity, *Gex v. Dill*, 86 Miss. 10, 38 S. 193.

Redemption. N. Y. Code Civ. Proc. section 2254, et seq. as to the right of a tenant under a lease having an unexpired term of five years or more to redeem in case of dispossession, construed, *Peabody v. Long Acre Sq. Bldg. Co.*, 188 N. Y. 103, 80 N. E. 657.

Sec. 315. Release of tenant's sureties. When the lessor failed to repair and furnish a hotel for the lessee as agreed, the sureties were released from obligations, although the lessee waived the right to demand the repairs and furnishing. It was also a breach of the lease releasing the sureties for the owner to sell a portion of the premises with the written consent of the lessee but without the consent of the sureties, especially when a stable was erected on the part of the premises sold which injured the hotel, *Stern v. Sawyer*, 78 Vt. 5, 61 Atl. 36.

Sec. 316. Equitable relief—Mistake.

As to reformation for mistake, see further *post* §§490-494. A lease executed by a city, pursuant to a resolution of the City Council, may be reformed because of mistake in its form, *Bronk v. Standard Mfg Co.*, 141 Mich. 680, 105 N. W. 33. Where in an action to reform a lease and for specific performance as

reformed and for damages in case an order for performance be not obeyed, where upon the trial it was conceded not to be a proper case for specific performance and damage for breach of contract did not clearly appear, the court might properly, after reforming the lease, refuse to assess damages. As the bill did not allege that any request had been made that the lease be corrected the complainants were properly ordered to pay costs, *Braithwaite v. Henneberry*, 222 Ill. 50, 78 N. E. 34.

Injunction. Where a lease provided that the tenant should work out road tax and allow the landlord "to fall plow and haul out manure" the latter covenant was not negative and an injunction would not lie to prevent interference with the landlord in so doing unless irreparable damages be shown. As the landlord's damages were speculative, the tenant's covenants secured by a surety who did not appear to be insolvent, and under the terms of the lease the landlord could declare it null and void he had a complete and adequate remedy at law and is not entitled to an injunction, *Carlson v. Koerner*, 226 Ill. 15, 80 N. E. 562.

Sec. 317. Actions.

Trespass. The lines between two mining claims had not been surveyed and the lessee asked the lessor's manager for a survey, and he told the lessee to "go on and not go over too far, but a few feet would not make any difference." The lessee then committed the trespass, but the acts of the manager did not amount to an instigation or a request to trespass and the lessor was not liable for the amount of ore extracted safely when the manager did not know it was a trespass, and because it was not within the authority of a manager to instigate a trespass so as to make the lessor liable for damages, *Patrick v. Brown*, 36 Colo. 298, 85 Pac. 325.

Evidence. Where in a suit upon a mining lease the plaintiff offered it in evidence the defendant may insist that the indorsement on it be read to the jury, *Wallace v. Dorris*, (Penn. 1907), 67 Atl. 858. In trespass by a tenant against a landlord for interference during the term of the lease various questions as to the admissibility of evidence, were discussed and decided, *Snedecor v. Pope*, 143 Ala. 275, 39 S. 318.

Notice of claim. Where a lease of a plantation provided that "in the event of a partial overflow of said land second

parties shall notify first parties on the 1st day of June of such year if they claim damages to the crop thereby", a notice given before June 1 was effective, *Lacy Bros. et al. v. Morton*, 76 Ark. 603, 89 S. W. 842.

LICENSE

Liability of owner to licensee injured on premises, see *post* §424.

Sec. 318. Who is licensee—Character of license. A was given a license by B to build a shed over a large portion of an alley over which B had a right of way for a yearly rental of one cent, which was not paid. This was construed as a personal license to A and adverse possession did not commence until his death and as 21 years had not passed since that time B was entitled to have the obstruction removed, *Wilson v. Cather*, 214 Pa. 3, 63 Atl. 190. A parol license for the drainage of land, without consideration, is a personal privilege, is not assignable and does not pass with the land, *Jones v. Stover*, 131 Ia. 119, 108 N. W. 112.

Sec. 319. Revocation. If the licensee under a parol license goes to great expense building a ditch across the licensor's land, the right to drain is irrevocable, and a subsequent purchaser is charged with notice, *Brantley v. Perry*, 120 Ga. 760, 48 S. E. 332. Where A had given B a verbal license to erect a porch over his land and B had told A he could use an outside stairway going to the second story of the building, B had a right to revoke the license at will since a mere verbal grant of a right of way does not operate to grant an estate in view of the statute of frauds, except when it is proved that the licensee has been to great expense relying on the license. *Howes v. Barmon*, 11 Idaho 64, 81 Pac. 48.

LIENS

As to landlord's lien see *ante* §301.

Vendor's lien, see *post*, §§607, 608.

Real estate charged with debts or legacies, see *post* §653.

Sec. 320. Attorney's lien. Kentucky Statutes 1903 section 107 as to attorney's liens upon land construed, *Lytle v. Bach*, (Ky. 1906) 93 S. W. 608. A redemption duly made by a junior lienholder takes precedence over a prior one which is not recorded within the time required by Rev. Laws 1905 Sec. 4483, *Coffman v. Christenson*, (Minn. 1907) 113 N. W. 1064. The Missouri Attorney's Lien Act of 1901 construed and held constitutional and remedial. Equity, where the legal remedy does not exist, will establish the lien which will not be destroyed by a settlement and release pending an appeal in which he is ignored where the judgment has not become final. But if the settlement be honest it will control as to the amount of his lien for a percentage of the amount recovered, *Wait v. Atchison, T. & S. F. Ry. Co.*, (Mo. 1907) 103 S. W. 60. Evidence examined and held to show that a tender of sufficient money to redeem a lot of land sold to pay debts was made within one year by the lienors who were entitled to redeem, in accordance with Kentucky Statutes 1903, section 1684, *Clemon's Admx. v. Combs*, (Ky. 1905) 89 S. W. 113.

Sec. 321. Judgment lien—In general. Decrees of Orphans' Court are made liens on land by N. J. Laws 1907, Ch. 134. Kirby's Arkansas Digest section 385 as to confirmation by a court of sale or attachment after judgment, construed, *Kenady v. Gilkey*, 81 Ark. 147, 98 S. W. 969. For the record of a case where suit was brought to enforce the lien of a judgment on land which has been held as a homestead, see *Ackiss' Ex'rs v. Satchel*, 104 Va. 790, 52 S. E. 378. B. and C. Comp. s. 205 was construed to render government land, for which the settler had made full payment of the purchase price and received his final certificate, subject to a judgment lien, *Budd v. Gallier*, (Ore. 1907) 89 Pac. 638. Hurd's Illinois Rev. St. 1905, c. 77, sections 1 and 20 respectively as to the lien of a judgment and the judgment creditor's right to redeem a prior mortgage on the debtor's land, construed, *Wehrheim*

v. Smith, 226 Ill. 346, 80 N. E. 908. Mississippi Code 1892, section 2413 which provides that judgments of a justice of the peace shall constitute a lien on all property of the defendants in the county when enrolled in the circuit court, construed, *Minshaw v. Geo. W. Davidson & Co.*, 86 Miss. 354, 38 S. 315.

When a husband and wife own property by the entirety the survivor owns it in fee simple and a judgment lien against the property must be first paid off by another subsequent creditor who desires to be subrogated to his rights or the property should be sold if necessary in the inverse order of alienation, *Oliver v. Wright*, 47 Or. 322, 83 Pac. 870.

Sec. 322. Judgment lien—Duration—Loss. A person who purchases land relying upon a judgment valid upon its face which constituted a lien on the land is not affected by its subsequent vacation upon proceedings brought more than a year after the sale; after the expiration of the term at which the judgment was rendered it can be vacated only by a bill in equity, *Hefferman v. Ragsdale*, 199 Mo. 375, 97 S. W. 890.

The sale of lands by an executor privately under the authority of a will does not divest the lien of a judgment against the executor although the debt was created after the death of the testator, *Hollinshed v. Woodward*, 124 Ga. 721, 52 S. E. 815. Where a judgment lien was properly proved, and was prior to all other judgment liens on certain lands, transfer of such lands was subject to this lien, and failure to enforce the prior lien in a suit of equity against land upon which the judgment was a lien, did not by such omission lose the benefit of said lien to the holder, who was entitled to have the same reported, and allowed in its proper order and priority, *Gilbert Bros. & Co. v. Lawrence Bros.* 56 W. Va. 281, 49 S. E. 155.

Sec. 323. Lis pendens—Creation—Loss—Who bound by. N. Y. Civ. Code sections 1670 et seq. as to the filing of a lis pendens, construed, *Schomacker v. Michaels*, 189 N. Y. 61, 81 N. E. 555.

Delays extending over 30 years in the prosecution of a suit for the recovery of land destroy through laches any lis pendens, although such delay was caused by the advice of a

reputable attorney, *Woodward v. Johnson*, (Ky. 1906) 90 S. W. 1076.

Who bound by. A conveyance made before the service upon the grantor of a citation in a suit for divorce is not affected by the doctrine of *lis pendens*, *Sparks v. Taylor*, (Tex. 1906) 90 S. W. 485. A purchaser at a foreclosure sale is not affected by an action of ejectment brought during the pendency of the foreclosure proceedings, *Bannard v. Duncan*, (Neb. 1907) 112 N. W. 353. Louisiana Rev. Civ. Code section 2453 prohibiting alienations *pendente lite* applies to a sale under foreclosure of a mortgage when the mortgage creditor is a party to the suit, *Scovel v. Levy's heirs*, 118 La. 982, 43 S. 642. Where during the pendency of two suits on certain notes adjudged a lien upon land, the owner conveyed to her children reserving a life estate in herself, the children were purchasers *pendente lite* and bound by the later judgment declaring the notes liens, although they were not parties thereto. *Hall v. Manns*, (Ky 1907) 100 S. W. 222.

Knowledge. The doctrine of *lis pendens* does not apply to a purchaser of Illinois lands from the heirs of an estate being administered as intestate where such person had no knowledge of a suit in Missouri to establish a will devising them, *Catholic University of America v. Boyd*, 227 Ill. 281, 81 N. E. 363.

Sec. 324. Other liens.

Attachment. Missouri Rev. Statutes 1899, section 388, paragraph 3, requiring the sheriff in a case of a real estate attachment to notify the tenant in possession, construed, *Siling v. Hendrickson*, 193 Mo. 304, 92 S. W. 105. In Massachusetts land held under a trust express or implied for the benefit of a defedant may be reached by a general attachment but land fraudulently conveyed must be specially attached. Where land is held by a third person in trust for the judgment debtor, he being entitled to a present conveyance, a purchaser at the execution sale takes a legal not a mere equitable title, *Lyons v. Urgalones*, 189 Mass. 424, 75 N. E. 950. Although by virtue of Mass. Rev. Laws, c. 167, Section 112, death of the defendant dissolves a special attachment of his property standing in another's name, the creditors upon obtaining judgment may levy upon such property in accordance with Rev. Laws c. 178, section 53. While trustees under a voluntary conveyance

from the debtor may not maintain a bill to cancel a suspended levy as a cloud on title where the execution was sued out by a non-assenting creditor, the latter should proceed to complete his levy without delay where previous attachments have been dissolved by the debtor's death, *Dunbar v. Kelly*, 189 Mass. 390, 75 N. E. 740.

Lien of water charge on purchaser of property. The rule made by a city owning its own waterworks that if the water charges made to the owner, not to the tenant, are not paid the water shall be shut off, which thus prevents a new tenant by tendering water charges from getting water until he pays charges due from a former tenant, is void because unreasonable, *Burke v. City of Water Valley*, 87 Miss. 732, 40 S. 820. A agreed to deliver a certain piece of real estate to B free from all liens and encumbrances but the city claimed a lien for delinquent water rates against B and shut off the water. A was not obliged to remove the encumbrance as any lien claim was invalid which made delinquent water charges a lien or an incumbrance on real estate after it had been acquired by a subsequent purchaser, and any ordinance granting the city a lien for the water rates was void in the absence of legislative authority, *Linne v. Bredes*, 43 Wash. 540, 86 Pac. 858.

Lien by agreement. Where a son in Missouri at the written request of his mother and father in Kentucky made payments to the seller of land to be used by the father and mother upon the father's assurance that the deed gave the son a lien it was held that the son within 15 years from the time of the payments was entitled as against the parents to an equitable lien on the land although the deed itself gave him no lien in fact, *Lee v. Lee's Adm'r.*, (Ky. 1907) 99 S. W. 306. When parties have entered into a trust agreement under which trustees shall control the erection of levees to reclaim certain lands and they subsequently pass resolutions to authorize the trustees to establish a pumping plant and drainage ditches, the cost of the pumping plant cannot be levied on the owners when the original agreement was not referred to in the subsequent authorization to construct the pumping plant. As the parties to the original agreement evidently did not contemplate a further extension of the work beyond the expense of building the levees, they were not liable, and the fact that the defendants were present at the meeting when the trustees

were authorized by unanimous vote to enter upon the additional expense, did not render them liable or impress their lands with a lien for the sums expended in accordance with such authorization, *Stone v. Harris*, 146 Cal. 555, 80 Pac. 711. When an agent performs services of benefit to real estate, and the owner knows of it and avails himself of the service, such as caring for mining property, paying the taxes on it, and keeping trespassers off of it, an agreement to pay the agent a fair value for his services is presumed, but a lien for such services does not follow the land so it may be attached after a sale, *Morrison v. N. H. & W. Mining Co.*, 143 N. C. 250, 55 S. E. 611. Where money is loaned upon a promissory note the mere fact that it was understood by the creditor that it should be used in the construction of buildings and was actually so used gives the creditor no lien, *Bartle v. Bartle*, (Wis. 1907) 112 N. W. 471.

Various statutory liens. Liens for removal of thistles are provided by Ore. Laws 1907, Ch. 168. Discharge of liens charged upon land by deed, &c., is provided for by payment of money into court by Pa. Laws 1907, No. 215.

List of. Collector of taxes required to furnish, on application of any person, list of municipal liens on land by Mass. Acts 1907, Ch. 378.

Sec. 325. Priorities—Subrogation. Where a loan agency took a mortgage of land subject to lien held by the State of Texas for the original purchase money and also to a lien for purchase money held by a third person, the loan agency upon discharging these two liens is subrogated to the rights of the original holders thereof, which were superior to the homestead claims of the mortgagor and his wife. The fact that the original purchase money notes were barred by the statute of limitations does not affect the liens nor prevent subrogation thereto, *Flynt v. Taylor*, (Tex. 1906) 93 S. W. 423.

Priorities. Where A, B, C and D have liens on the property of E, and D holds a mortgage on property of F, which was really the debt of E to F, which E guaranteed to pay and on which he had paid the interest until the assignment for the benefit of his creditors, then D cannot be compelled to exhaust the property covered by the mortgage but he can share in the order of priority of his confessed judgment lien in the property of A, and then obtain the balance from the property

covered by the mortgage if the property of E should not be sufficient. F, on whose property the mortgage to D guaranteed by E stands, may appear in equity by petition although not an original party to the suit, *Bradley v. Bond*, 101 Md. 691, 61 Atl. 505. The priority of a judgment lien may be continued as against other bona fide judgment creditors and purchasers only by the issuance of an execution and an actual levy within the time (5 years after the rendition of the judgment) limited by statute, *Glenn v. Glenn*, (Neb. 1907) 112 N. W. 321. Under Hurd's Ill. Rev. St. 1903, p. 1134, which provides that no execution shall issue upon any judgment after seven years from the time it becomes a lien, except upon a revival by scire facias, after the expiration of the seven years and before revival by scire facias, an occupation of the premises as a homestead gives the occupier a lien prior to that of the judgment up to \$1,000, *Misener v. Glasbrenner*, 221 Ill. 384, 77 N. E. 467. The defendant conveyed to A, trustee, a house and lot as security for the payment of two negotiable notes. After the payment of one of the notes it was returned by the payee directly to the defendant without marking it paid. One M in collusion with the defendant, represented himself to the trustee to be the owner of this note and claimed default in the payment of the note. The property was sold by the trustee to M. to satisfy the claim, for less than the face value of both notes. M. after obtaining a deed from the trustee conveyed the property to trustees of a loan association as security for a \$2,000 loan that had been borrowed by M., following which M. and wife conveyed the property to a trustee for the benefit of the wife of the defendant, who assumed the payment of the loan association debt as part payment of the consideration, but had not paid it. Under these circumstances she was not a bona fide purchaser entitled to preference over the holder of the original promissory note secured by the real estate, *Wasserman v. Metzger*, 105 Va. 744, 54 S. E. 893.

Sec. 326. Estoppel—Quieting. Where the owner of certain mines gave an option to purchase the mines and caused his agent to post notices on the property that the optionees were the owners, he was estopped from setting up his own title against the liens of miners who performed work relying

on the option, *Eastwood v. Standard M. & M. Co.*, 11 Idaho 195, 81 Pac. 382.

The quieting of liens, unenforceable through lapse of time, is provided for by Neb. Laws 1907, Ch. 97.

Sec. 327. Practice—Pleading. Kentucky Civil Code Practice sections 692 and 694 as to petitions to enforce liens on land, construed, *Barry v. Baker*, (Ky. 1906) 93 S. W. 1061. Where pending petitions to enforce certain liens the property was sold under a mortgage entitled to priority the petitioners did not lose their rights to the surplus in the hands of the mortgagee by failing to perfect their liens by a final decree and obtaining a useless decree for sale of the property, *Maquire v. Spaulding*, 194 Mass 601, 80 N. E. 587.

A bill to enforce a vendor's lien reserved in a contract of sale must allege willingness to make such a deed as the agreement specifies, *Powell v. Hunter*, 204 Mo. 393, 102 S. W. 1020.

MECHANIC'S LIENS

Sec. 328. What law governs—Compliance with. The rights of the parties to a mechanics' lien are governed by the law in force at the time the contract was entered into, *Treloar v. Hamilton*, 225 Ill. 102, 80 N. E. 75. "Liens on real estate and on immovables are governed by the law of the situs of the thing upon which the lien is sought to be enforced" irrespective of where the contract under which the work was done was entered into: "Therefore the law of the Indian Territory would govern as to lien for the material which went into the roadbed" of a railroad "in the Indian Territory, and, being no lien there, there is no ground for enforcing a lien in Arkansas, even if such law had extraterritorial effect," *Midland Ry. Co. v. Moran Mfg. Co.*, 80 Ark. 399, 97 S. W. 679.

A mechanic's lien to be valid must show a substantial compliance with all the requirements of the statute, and the burden of proof is on the man claiming the lien to prove the facts necessary to the validity of the lien, *U. S. Blowpipe Co. v. Spencer* (W. Va. 1907) 56 S. E. 345.

Sec. 329. General statutes—Construction—Constitutionality. Kirby's Arkansas Digest Section 4970 to 4980 as to mechanics' liens, construed, *Long v. Abeles & Co.*, 77 Ark. 157, 93 S. W. 67. The Arkansas railroad lien act construed, *Midland Ry. Co. v. Moran Mfg. Co.*, 80 Ark. 399, 97 S. W. 679. Kentucky St. 1903, section 3453 as to liens for improvements in cities, construed, *Cabell v. Henderson*, (Ky. 1905) 88 S. W. 1095. Kentucky Statutes 1903 section 2463 as to mechanics' liens, construed, *Hall v. Bullock's Trustee*, (Ky. 1906) 97 S. W. 351. Kentucky Statutes 1903 section 2468 as to mechanics' liens, construed, *Mivelaz v. Johnson*, (Ky. 1907) 98 S. W. 1020. B. & C. Comp. s. 5668 relating to miners' liens by laborers and miners was construed, *Slover v. Bailey*, (Ore. 1907) 90 Pac. 665.

Three years' contract. A contract for the construction of a building to be completed on or before four months from date of its execution with a provision that the owner would accept it upon receipt of an architect's certificate was not a contract which might not be completed within three years within the meaning of Illinois Laws 1895, p. 228, which provides that in such a case there shall be no mechanics' lien, *Merritt v. Crane Co.*, 225 Ill. 181, 80 N. E. 103.

Constitutionality. Const. Art. 28, s. 15, and Code Civ. Proc. s. 1194, were not construed to give mechanics performing manual labor a prior lien, but any such provision was void which gave a preference against materialmen in favor of laborers, *Miltimore v. Nofsiger Bros. Lumber Co.* (Cal. 1907) 90 Pac. 114.

Sec. 330. Who may claim—One furnishing the labor of others—Architect. Under St. 1898 Sec. 3314, one who bores a well on the land of another who consents but gives notice in advance that he will pay nothing, is not entitled to a lien, *Clark v. North*, 131 Wis. 599, 111 N. W. 681. Code Sec. 3105, giving a miner a lien on property of the person &c. "owning or operating" the mine in which he works, construed, *Caster v. McClellan*, 132 Ia. 502, 109 N. W. 1020. When the contractor made an agreement to furnish marble and on the failure of the marble company to supply the material contracted with a third party to supply it at the same price, the third party was entitled to a mechanic's lien. Although the work in cutting the marble was done away from the building,

a mechanic's lien for it was still enforceable. Acts 1898 p. 1169 c. 502, *Evans Marble Co. et al. v. International Trust Co.*, 101 Md. 210, 60 Atl. 667.

One furnishing the labor of others. Under Mass. Pub. St. c. 191, section 1, a mechanic's lien can be sustained in favor of a person who has done no manual labor himself but has "furnished" it through his employees, *Wera v. Bowerman*, 191 Mass 458, 78 N. E. 102. Where a man who was employed to get out logs employed others to assist him his payment of their wages did not operate as an assignment to him of the lien held by the laborer for the debt but extinguished both the debt and the lien. The Arkansas Statute as written gives the lien to the one who performed the labor and not to the one who hires labor performed and pays for it, *Valley Pine Lumber Co. v. Hodgins*, 80 Ark. 516, 97 S. W. 682.

An architect who was to receive a certain sum for making plans and specifications and supervising the erection of the building was entitled to no lien because his contract was entire, and the statute gives no liens for making plans and specifications, *Libbey v. Tidden*, 192 Mass. 175, 78 N. E. 313. Under Sec. 4788 Rev. Codes 1899, a supervising architect is entitled to a lien for his services, *Friedlander v. Taintor*, 14 N. D. 393, 104 N. W. 527.

Sec. 331. For what labor and materials—Things subsidiary to work. Threshermen are given a lien on crops for their services, next to that of the lessor by La. Acts 1906, No. 53. Alabama Code 1896 sections 2712 and 2716 which provided for the creation of labor liens upon a crop and the assignment of such a lien, construed, *Farrow v. Wooley et al.* (Ala. 1907) 43 S. 144. Sec. 5668-5672 B. & C.'s Codes, providing for liens for labor and materials furnished for mines are amended by Ore. Laws 1907, Ch. 152. B. & C. Comp. §5640, relating to mechanic's liens, was construed as granting a lien to mechanics for work done on an irrigation ditch, which had been given by the owners into the hands of certain contractors to construct, and the mechanics were entitled to recover the reasonable value of their services, *Quackenbush v. Artesian L. Co.*, 47 Or. 303, 83 Pac. 787.

Feed for teams. A person who furnished hay, grain, straw and feed to a contractor to keep teams working on a railroad

is not entitled to a lien under Ohio Rev. St. 1906, section 3208, *Pennsylvania Co. v. Mehaffey*; 75 Ohio St. 432, 80 N. E. 177.

Carting. Under Burn's Indiana Ann. St. 1901, Section 7255, as to mechanics' liens, a laborer employed to haul away dirt dug out of, and to haul sand to be used in refilling a trench dug in a street for a steam pipe connecting a plant for generating steam to be distributed for heating purposes throughout the city, is entitled to a lien, *Wells v. Christian*, 165 Ind. 662, 76 N. E. 518.

Dynamite actually used by sub-contractors in grading and building a railroad roadbed is a "material" within the meaning of the New York Mechanics' Lien Law, (Laws 1897, p. 516, c. 418, section 3) for which a lien may be asserted. The case contains a very valuable discussion of previous legislation, Haight J. dissenting, *Schaghticoke Powder Co. v. Greenwich, & J. Ry. Co.*, 183 N. Y. 306, 76 N. E. 153.

Fittings for buildings. A charge for repairing a lock, due to the loss of parts by one of the contractors, after it had been put in place, is lienable, *Nancolas & Howard v. Hitaffer & Prouty* (Ia. 1907) 112 N. W. 382. Under Rev. St. 1898, Sec. 3314, subd. 1, screens manufactured for and fitted to a house are part of it and may be the subject of a lien, *E. M. Fish Co. v. Young*, 127 Wis. 149, 106 N. W. 795. Although the act of June 15, 1897 (P. L. 155) extended the provisions of the mechanic's lien law to plumbing, gas fitting, gas fixtures, electric wiring, etc., a materialman who supplied gas fixtures for a building after the passage of the act under a contract made prior to June 15, 1897, had no right to file a mechanic's lien to enforce the payment for the gas fixtures, *Horn & Brannen Mfg. Co. v. Steelman*, 215 Pa. 187, 64 Atl. 409.

Work done away from property. A workman may have a lien for his labor on special ornamental plastering performed, with consent of the owner, at his shop, even though, owing to a dispute between owner and contractor, the plastering is not used, *Berger v. Turnblad*, 98 Minn. 163, 107 N. W. 543. One who is engaged in cutting logs at a distance from a saw mill, under a contract with the owner by which he is to receive so much per 1000 feet delivered at the mill is not entitled to a lien on the mill under a statute (*Ballinger's* [Wash] Ann. Codes & St. s. 5919) giving a lien for labor "in the operation of" a saw mill. *Graham v. Gardner*, (Wash. 1907) 89 Pac. 171.

Sec. 332. Who bound by—Lessor and lessee—Vendor and vendee.

Lessor and lessee. A mechanics' lien for labor on an oil or gas well may not be established against a lessee's interest in the land or his personal property, *Eastern Oil Co. v. McEvoy*, 75 Kan. 512, 89 Pac. 1048. Although the builder of a house merely held a lease from the school lands leasing board, he was an "owner" within the meaning of the mechanics' lien law, and a mechanic furnishing material and labor was entitled to a lien on the land and house, subject to the lessor's interest, *Black v. Pearson*, (Okla. 1907) 91 Pac. 714. A mechanics' lien may be enforced against a leasehold estate although the tenant has the right to remove the buildings, machinery and other fixtures, *Jarrell v. Black*, (Okla. 1907) 92 Pac. 167. In an action to enforce a mechanics' lien for labor done in drilling an oil well for an alleged lessee no recovery can be had in the absence of evidence that the person who employed the plaintiff was ever authorized by the lessee to dig a well, *Littler v. Friend*, 167 Ind. 36, 78 N. E. 238. Where a contractor supplied glass for a house, he was not entitled to a lien on the property when the contract was made with the lessee, although the property was improved to the benefit of the lessor, *Pittsburg Plate Glass Co. v. Peters Land Co.*, 123 Ga. 723, 51 S. E. 725. Code Civ. Proc. §1183, amended by St. 1903, p. 84, c. 76, relating to mechanics' liens, was construed to allow a lien for work or material used in a mine although it was done at the order of the lessee who was operating the property, *Higgins v. Carlotta Gold M. Co.* 148 Cal. 700, 84 Pac. 758.

Vendor and vendee. Under Sec. 6248 Rev. Codes 1905 a vendee under a crop payment contract is an "owner" whose interest may be made the object of proceedings to enforce a mechanics' lien, *Salzer Lumber Co. v. Clafin*, (N. D. 1907) 113 N. W. 1036. A vendor who terminates the rights of the vendee for breach of contract takes the land subject to a mechanic's lien acquired during the vendee's possession of which he had actual and constructive notice, *Salzer Lumber Co. v. Clafin*, (N. D. 1907) 113 N. W. 1036. Where the vendor and vendee co-operate together in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material which have

been furnished for such improvements," *Guion v. Ryckman*, (Neb. 1906) 110 N. W. 759.

Section. 333. Against what land or buildings—Public buildings.

When an educational institution gives free education and uses its funds as "public property," it is not subject to a mechanics' lien, when there is no statute authorizing it, *Neal-Millard Co. v. Trustees of Chatham Academy*, 121 Ga. 208, 48 S. E. 978.

On buildings. A mechanics' lien may be enforced upon the building as well as the land and therefore when the description as to one is so vague as to render it void it may be enforced against the other, *Salter v. Goldberg*, (Ala. 1907) 43 S. 571. Under Florida Acts of 1903 section 5, c. 5143, p. 78, part of the mechanics' lien law, where only a portion of the materials for which the lien was claimed were actually used in the construction, equipment or repair of a building owned by the defendant, and no identification of the building was made, it was error to decree a lien on a power house, building, machinery, and all the equipment of the defendant for the whole amount of materials found to have been sold in good faith for the purpose of being used in the construction, equipment, or repair of the building, *Griffith v. Henderson*, (Fla. 1906) 42 S. 705.

Public buildings. Tit. 3, Ch. 23, Sec. 3400, 3402 and 3418 Code Civ. Proc. relative to enforcement of liens for work on municipal and state buildings are amended by N. Y. Laws 1906, Ch. 255. Utah Rev. St. 1898 §1399, relating to filing mechanics' liens on public buildings, was construed, *Smith v. Bowman*, (Utah 1907) 88 Pac. 687. Mechanics' lien enforced by resort to contractor's bond and not by sale of public building, *Allen County v. U. S. Fidelity Co.*, (Ky. 1906) 93 S. W. 44.

Extent of land covered. Under Maryland Code Pub. Gen. Laws Art. 63, section 4 a mechanics' lien covers merely the land under the building, the building, and so much ground immediately adjacent thereto as may be necessary for the ordinary and useful purposes of the building. It does not cover 1293 acres containing several parcels each with its own farm houses and fences, *Filston Farm Co. v. Henderson & Co.*, (Md. 1907) 67 Atl. 228.

On homestead. A materialman furnished material for the erection of a house on a homestead, but he was not entitled to a lien as he had no contract in writing with both husband and wife, *Rawley v. Varnum*, 15 Okl. 612, 84 Pac. 487. Under Comp. Laws Sec. 10,710, 10712 and 10,718 and Laws 1891, Sec. 9, Subd. 4 a contractor may have a lien under a contract to build a house on a homestead lot and the house will be ordered sold separately. *Holliday v. Mathewson*, 146 Mich. 336, 109 N. W. 669.

An oil well derrick attached to a leasehold estate is subject to a mechanic's lien by those furnishing the lumber to build the same, *Showalter v. Lowndes*, 56 W. Va. 462, 49 S. E. 448. Where a laborer has done work on an oil claim in sinking a well, or a materialman has supplied materials for it, he has a lien against the entire acreage of the property to the extent of the employer's interest in it as well as against the entire mining claim under Code Civ. Proc. §1183, 1185, 1187, which applies to an oil claim as well as an ore mining location, *Berentz v. Belmont O. Co.*, 148 Cal. 577, 84 Pac. 47.

Sec. 334. Amount—Where contractor fails to perform—Contract price and extras. A finding of a jury that \$25. should be deducted from the full claim of \$200. by a plaintiff in a mechanics' lien suit is consistent with a finding that he in good faith attempted to perform his contract and has substantially performed it, *Bergfors v. Caron*, 190 Mass. 168, 76 N. E. 655.

Where a contract is abandoned and the owner completes the work lien claimants are entitled to such proportions of their claims as the contract price bears to the actual cost, *Kotcher v. Perrin*, (Mich. 1907) 113 N. W. 284.

In a suit to enforce a mechanics' lien the evidence was examined and held to show such a substantial performance by the contractor as is necessary to sustain a lien, *Easthampton L. & C. Co. v. Worthington* (2 cases) 186 N. Y. 407, 581, 79 N. E. 323, 325. If the work was defective or if there were damages due to delay in completing the work as specified in the contract, they may be set off against a builder enforcing a mechanics' lien, *Tenney v. Anderson Water, Light and Power Co.*, 69 S. C. 430, 48 S. E. 457. A contractor may not maintain a mechanics' lien until his contract has been substantially performed; here he was held bound to furnish a

license to use a patented heating system, *Hankee v. Arundel Realty Co.*, 98 Minn. 219, 108 N. W. 842. The plaintiff, who brought an action to maintain a mechanics' lien against a building, had failed to put the windows in the basement on a direct line below the windows upstairs which was not a workmanlike way to do his job, and it was not a trivial imperfection as it was in the front of the house and a part of the ornamentation of the house. The plaintiff did not display good faith in abandoning the job without fixing these imperfections and he was therefore only entitled to a personal judgment for the amount due less the cost of the alterations and he was not entitled to a lien with attorney's expenses when he had refused a tender of the sum due and it had been paid into court, *Schindler v. Green*, (Cal. 1905) (Rehearing 1906) 82 Pac. 631.

Lien limited to agreed cost. When an improvement company agrees to erect a house on land, and authorizes the purchaser to contract with a builder to erect the house, the improvement company is not liable for anything beyond a certain agreed cost when the builder knew what that cost was to be, and a mechanics' lien is not enforceable against the improvement company for the extra expense, *Builders Sup. Co. v. No. Augusta E. & I. Co.*, 71 S. C. 361, 51 S. E. 231.

Sec. 335. Ownership of land—Title in wife and contract with husband. When materials for a warehouse are supplied by a contractor he may file a lien against the building, but not against the land if the land is owned by a railroad and has merely been leased for 20 years with the right to remove the buildings, *Central of Georgia Ry. Co. v. Shivers*, 125 Ga. 218, 53 S. E. 610.

Title in wife and contract with husband. In an action against husband and wife to enforce a mechanics' lien on the separate property of the wife under a contract for its improvement, the defendants were entitled to recover on the ground of the husband's knowledge and the examination of the wife apart from the husband, *Ball & Sheppard v. Paquin*, 140 N. C. 83, 52 S. E. 410. When a man supplying material is employed by the husband in erecting a house and the title is in the wife, the debt belongs to the husband, and the house and lot are not subject to a mechanic's lien for the material, if there has been no misrepresentation, *Reaves v. Meredeth*, 123 Ga. 444, 51 S. E. 391. Under Sec. 4527, p. 870 Statutes 1893,

a materialman who makes a contract with the husband to furnish material for a building constructed on land owned by his wife is entitled to a mechanic's lien on the property, *Limerick v. Ketcham*, 17 Okl. 532, 87 Pac. 605.

Title subsequently acquired. When a company makes a contract with a contractor to erect a building on land it does not own, the building is liable for mechanics' liens, and if the company subsequently acquires title to the land, the land is also liable for mechanics' liens under Sec. 7, (P. L. 1898, p. 540) of the mechanic's lien law, *Stewart Contracting Co. v. Trenton & N. B. R. Co.*, 71 N. J. Law 568, 60 Atl. 405.

Sec. 336. Contractor's bond. As to the nature of a building contractor's bond in favor of the owner required by Louisiana Act. No. 180, p. 223, of 1894, see *Hughes v. Smith*, 114 La. 297, 38 s. 175. Louisiana Act. No. 180, p. 223 of 1894 which requires an owner upon whose land a building is to be erected to take a bond of the contractor to protect workmen and material men, construed, *Lhote Lumber Mfg. Co. v. Dugue*, 115 La. 669, 39 S. 803. By Act of Congress August 13, 1894, chap. 280, 28 Stat., 278 (U. S. Comp. St. 1901, p. 2523) a bond must be filed by the contractors to secure the prompt payment of all persons supplying them with labor or materials. A materialman brought suit on the bond in the name of the United States when the contractor failed to pay him and he recovered, but his recovery did not release the bondsman from suits by other laborers or materialmen. *United States v. U. S. F. & G. Co.*, 78 Vt. 445, 63 Atl. 581. When a materialman supplying bricks to a sub-contractor continued to supply them to his sureties, who carried on the original contract after he became financially embarrassed, the bondsman on the bond given by the contractor was not relieved from liability according to the Philadelphia municipal ordinance of March 30, 1906, requiring a bond to indemnify laborers or materialmen, *Philadelphia v. Nichols*, 214 Pa. 265, 63 Atl. 886. Although county or municipal property devoted to public use is necessary in the proper administration of governmental affairs and will not be sold to satisfy a mechanic's lien, if the county had refused to pay such honest claims the creditors who applied to court for redress would not have been turned away empty-handed, as the authorities of the county would have been forced by the mandatory process of the law to levy

a tax to pay these debts; a county, therefore, which paid such claims can recover the amount thereof from the surety upon a contractor's bond given to secure his performance of a contract to erect a courthouse, *Allen County v. U. S. Fidelity Co.*, (Ky. 1906, 93 S. W. 44.

Sec. 337. Loss or waiver of lien—Discharge—Destruction of building—Removal of building.

Destruction of building, see *ante* §298.

Taking notes. A person entitled to a mechanics' lien who has negotiated notes payable to him, given by the contractor, may, after filing a petition to enforce his lien, take up the notes and enforce the lien in full, *Moore v. Jacobs*, 190 Mass. 424, 76 N. E. 1041. The taking of a note of the builder by a sub-contractor for a debt which is a lien, or the negotiation of a note at a bank, will not impair the lien, where the payee is compelled to take up the note. The fact that the principal contractor gave the owner of the building a receipt reciting that all mechanics' liens were paid is immaterial when it did not appear that the sub-contractor had authorized the receipt, *Mivelaz v. Genovely*, (Ky. 1905) 89 S. W. 109.

Taking security. Under Sec. 695 Code Civ. Proc., providing that no person shall be entitled to a mechanics' lien who takes collateral security, a promise to take a mortgage which the owner refused to give does not deprive the mechanic of his right to a lien, *Rolewitch v. Harrington*, (S. D. 1906) 107 N. W. 207.

Waiver. When a materialman signs a "Waiver of Lien" saying "The undersigned hereby waives all right, title and interest to any privilege of lien for materials, labor and stock", etc., used in a building in order to enable the owner to obtain a mortgage on the property the waiver includes all material, etc., furnished between the time of signing the lien and the time of executing the mortgage as well as all claim for liens prior to the date of the waiver, *Weinberg v. Valente*, (Conn. 1906) 64 Atl. 337. A contract between an owner and contractor which stipulated that all payments should be made under section 35 of the Illinois Mechanics' Lien Law, which provides that the original contractor upon request shall furnish the names of all sub-contractors, does not waive the contractor's lien. An indorsement upon the contract of an agreement by the owner to pay a certain additional sum for in-

creased cost of materials did not constitute an entirely new contract which would not support a lien because it failed to fix a time for payment and completion of the work, *Concord Apartment House Co. v. O'Brien*, 228 Ill. 476, 81 N. E. 1076.

Discharge. Mass. Rev. Laws, c. 197, sec. 28, as to dissolution of a mechanic's lien by the giving of a bond, construed, *Rockwell v. Kelly*, 190 Mass. 439, 77 N. E. 490. Sec. 3413 Code Civ. Proc. providing for the discharge of liens is amended by N. Y. Laws 1907, Ch. 395.

The destruction of the building does not cause the loss of a lien once attached to the land, *Halsey v. Wankesha Springs Sanitarium*, 125 Wis. 311, 104 N. W. 94. It was held that the holder of a materialman's lien on an ice plant which was destroyed by fire was not entitled to the benefit of fire insurance collected thereon by the owner. The lienholder could have insured his own interest separately, *Vogt. Mach. Co. v. Lingenfesler*, (Ky. 1907) 99 S. W. 358. Before a lien had been filed against a building it was destroyed by fire without any negligence on the part of the owner, but the mechanic was not then entitled to a lien on the land under Code Civ. Proc. §1183, 1185, *Humboldt L. M. Co. v. Crisp*, 146 Cal. 686, 81 Pac. 30.

The defendants removed a building before the 40 days had expired for filing mechanics' liens, but they were not relieved of notice of the mechanics' liens and the building was held to be still liable to them. When it would work a great injury to the defendant's property to remove the building the lot on which the building was first erected should be sold and then the defendant's lot and building should be sold to satisfy the balance of the purchase price, with the privilege of redemption from the sale. If it were possible to return the building to the lot it should be done. *Sanford v. Kunkel*, 30 Utah 379, 85 Pac. 363.

Sec. 338. Subcontractors and materialmen—In general—Performance of contract—Extras—Contract completed by sureties. Sec. 4788 Rev. Codes 1899 providing for liens for labor and materials held to apply to subcontractors by *Robertson Lumber Co. v. State Bank of Edinburg*, 14 N. D. 511, 105 N. W. 719. Under Code Civ. Proc. 1183, a company furnishing materials for the construction and drilling of an oil well was entitled to have a lien on the interest of

the owner of the well, although he did not own the property in fee simple, *Park and Lacy Co. v. Inter. Nos. Oil and D. Co.*, 147 Cal. 490, 82 Pac. 51.

Although the plastering in a house has yellow spots on it, the sub-contractor supplying the labor and plaster has a right to a lien on the property, when it is proved that he did his work in a workmanlike manner, and that the discolorations occurred through no fault of his, *Mannix v. Tryon*, (Cal. 1907) 91 Pac. 983. When an owner makes a contract with a contractor to furnish material and labor and afterwards makes a verbal contract with the sub-contractor, he has a right to a mechanics' lien, although a part of the work is not completed owing to the refusal of the owner to select the paper with which to paper certain rooms of the house. *Limerick v. Lee*, 17 Okl. 165, 87 Pac. 859. An answer by a jury in an action to enforce a mechanics' lien to the effect that a certain sum was due the petitioner for labor and materials furnished on the premises under a contract is inconsistent with an abandonment of the contract by the contractor which would deprive him of a lien, *Rochford v. Rochford*, 192 Mass. 231, 78 N. E. 454.

Extras. A sub-contractor for grading of a railroad was held entitled to maintain a lien for work done not in accordance with the original contract but by direction of the chief engineer in order to secure the completion of the line within the necessary time limit, *W. O. Johnson & Sons v. Des Moines Ry. Co.*, 129 Ia. 281, 105 N. W. 509. Where an owner accepting a bid for lumber wrote "I do this with the understanding that it includes all material necessary to finish the building" and there was no further agreement, the materialman had no right to a lien for extras supplied, *Littell v. Saulsberry*, 40 Wash. 550, 82 Pac. 909.

Contract completed by sureties. The sureties of a contractor completed a building according to the contract but the creditors of the contractor who had furnished labor or materials for him were not debarred from claiming part of the contract price, which was not earned by the contractor when he delivered the contract to his sureties to complete, although the contract provided that the county might make a new contract in case of failure to complete the building and charge the expense thereof to the original contractor, as the completion by the sureties was not a new contract, *Union Stone*

Company v. Board of C. F., Hudson County, (N. J. Ch. 1906), 65 Atl. 466.

Sec. 339. Sub-contractors and materialmen—Notice of intention to claim lien—To stop payment—Knowledge and consent of owner—Notice or agreement not to claim lien.

Notice to owner of intention to claim lien. Under Shannon's Tennessee Code Section 3580 an assignee of a mechanic's claim for railroad construction cannot give the required notice, Norman & Co. v. Edington et al., 115 Tenn. 309, 89 S. W. 744. Sec. 3092 & 3093, Code, providing for the filing of a statement of lien and serving of notice thereof on owner by a sub-contractor, construed by Lindsay & Phelps Co. v. Zoekler, 128 Ia. 558, 104 N. W. 802. Under Chapter 5143 p. 78 Florida Acts 1903 a sub-contractor who gives an owner of land notice that the contractor owes him money makes the owner personally liable for the sum stated to be owed and gives the sub-contractor a lien which may be enforced by a bill in equity, McDonald v. Erwin, (Fla. 1907) 43 S. 872. New Jersey P. L. 1898, p. 538 section 3, as to the sufficiency of a notice to an owner by a claimant of a mechanics' lien, construed, McNab & Harlin Mfg. Co. v. Patterson Bldg. Co., (N. J. 1907), 67 Atl. 103. Alabama Code 1896, section 2731 et seq. as to mechanics' liens which provides for the form of notice to the owner to be given by all claimants other than the original contractor, and that it shall be the duty of the original contractor to defend all such suits against the owner, construed, McDonald Stone Co. v. Stern & Marx et al., 142 Ala. 506, 38 S. 643. Penn. P. L. 434, section 6 which provides that a sub-contractor who furnishes material for a "city improvement must give a preliminary notice of his intent to file a lien, construed, Tenth Nat. Bank v. Smith Const. Co., No. 1, Phila. (Penn. 1907) 67 Atl. 872. Where a construction company in the hands of a receiver who has no authority to buy materials on credit obtained them from a sub-contractor a notice given the owner within six months from the time the material was furnished but more than six months after the receiver was appointed will not support a mechanics' lien, Tenth Nat. Bank, Phila., v. Smith Const. Co., No. 2, (Penn. 1907), 67 Atl. 874.

Notice to owner to stop payment to contractor. Accord-

ing to Sec. 3 of the mechanic's lien law a sub-contractor may serve a stop notice on the owner of a building to compel the owner to retain in his hands funds sufficient to pay the amount the contractor owes him. But where a note which had not matured was held by the sub-contractor the owner was not obliged to retain in his hands sufficient funds of the contractor to pay the sub-contractor as the debt was not due until the maturity of the note. *Taylor v. Wahl*, 72 N. J. Law 10, 60 Atl. 63. The Mechanic's Lien Law, sec. 3, (P. L. 1898, p. 538) was construed to make a stop notice, stating that a certain sum of money was due from the contractor who refused to pay it, sufficient, and it was unnecessary to make it more explicit, *Beckhard v. Rudolph*, (N. J. Err. Law & App. 1906) 63 Atl. 705. The Mechanics' Lien Law, sec. 3, (P. L. 1898, p. 538) relating to the services of stop orders on the owner, was construed to grant a laborer who had transported material to the building a right to a lien when he served on the owner a written assignment of a sum due the contractor stating that the labor and material had been furnished the contractor, although the lien statement stated inaccurately that it had been supplied to the owner. Even though a part of the items regarding the labor were not lienable under the terms of the act, he was entitled to a lien for the whole sum assigned by the contractor, *McNab & Harlin Mfg. Co. v. Paterson Bldg. Co.*, (N. J. Ch. 1906) 63 Atl. 709.

Knowledge and consent of owner. A note given by a landlord to his tenant who was about to erect a building on the land read: "Mr. Taylor [manager of a lumber company] it is O. K. with me as for Mr. O'Neil having the lumber and building. Geo. Beckleen." Held—This would not entitle the lumber company to maintain a lien, *Oregon Lumber Co. v. Beckleen*, 130 Ia. 42, 106 N. W. 260. An owner who agrees to be personally responsible for materials furnished is liable to the dealer for payments made out of a special reserve fund provided for by the contract after the dealer's lien has been filed, *Nancolas and Howard v. Hitaffer & Prouty*, (Ia. 1907) 112 N. W. 382. Where an owner contracted with an architect for a house and the latter contracted with a builder to construct it at an increased price, who later with the owner's knowledge built the house, and although shortly before its completion the owner for the first time learned from the builder the fact that his contract with the architect stipulated such advanced

price the owner made no objection and permitted the builder to finish the job, it was held that the builder had furnished labor "with the consent" of the owner within the meaning of the statute and was entitled to a mechanics' lien therefor, *Vickery v. Richardson*, 189 Mass. 53, 75 N. E. 136.

Notice or agreement not to claim lien. Where a contractor who had agreed with the owner to keep the property free from liens contracted with a sub-contractor to do likewise the latter having known of the original agreement with the owner cannot claim a lien for services and materials, *Swift Co. v. Dolle*, (Ind. 1907), 80 N. E. 678. Where a contract contained a "no lien" stipulation which was duly recorded as provided by act of June 26, 1895 (P. L. 369), and the lumber was delivered before signing the contract and used for work not called for in the contract, the materialman had no right to a lien on the building when it was completed, *Craig v. Commercial Trust Co.*, 211 Pa. 7, 60 Atl. 317. If a landowner has posted a notice on a house, reciting that he will not be responsible for labor or material employed in repairing it, he will not be liable for a mechanic's lien, when the notice posted in accordance with B. & C. Comp. s. 5643 was readily visible to all who passed at the front of the building, *Marshall v. Gardinell*, 46 Ore. 410, 80 Pac. 652.

Sec. 340. Sub-contractors and materialmen—Owner's duty to protect lien or in making payments—Application of payments—Set-off.

Necessity of protecting lienors in making payments. Where a contractor was bound by his contract to furnish the material for a building the owner in an action to enforce a mechanic's lien thereon might show that he had paid for materials actually used in the building thus saving it from other liens and with such sums he should be credited, *Gates v. O'Gara*, (Ala. 1905) 39 S. 729. An owner guaranteed the payments to certain materialmen as his contractor represented to him that he was unable to obtain credit for them and the contractor offered to allow the owner to deduct the amount from the completion payment. A notice to withhold payment was given the owner by a lumber company, but he paid the bills he had guaranteed after receiving the notice although the notice was sufficient to compel him to reserve the money from the completion payment. Under these circumstances he

had a right to deduct the money due the lumber company and the attorney's fees as well as the payments he made and damages for failure to complete the building on time from the amount of the completion payment but if their total were more than the amount of the completion payment the owner would have no right to reimburse himself from the final payment unless there were a surplus above the mechanics' liens as the final payment was reserved for the payment of liens by law, *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200. Where a contractor abandons a contract which is then finished by the owner at a cost less than the contract price, and a materialman who had supplied material to the contractor puts a mechanic's lien on the building less in amount than the difference in the cost and the contract price, the owner claiming to have made advances as a defence to the lien must show that such advances were made in accordance with the law creating materialmen's liens, See Code of 1896, sec. 2801 amended by Acts 1897 and Acts 1899, p. 33, *Prince v. Neal-Millard Co.*, 124 Ga. 884, 53 S. E. 761. An owner entered into a contract with his builder that a completion payment should be made when the buildings have been "completed and accepted by the architect", but the provision could be waived by the owner as it was for his own protection, and the waiver did not render him liable for a mechanic's lien under Code Civ. Proc. §1184, *Valley Lumber Co. v. Struck*, 146 Cal. 266, 80 Pac. 405. Where the claimant is entitled to recover only his proportionate part of the contract price of the building, the fact that the owner has paid the contractor without requiring any statement from the latter as to claims for labor and material outstanding does not entitle the claimant to a lien for a larger sum than he could have obtained in the absence of any payment at all, *Godfrey Lumber Co. v. Cole*, (Mich. 1908) 114 N. W. 1018. An owner made a contract with a builder, which was duly filed, by which the last payment should be made on the architect's final certificate, but when the building was completed before the architect made his final certificate, and the owner paid the builder after the completion of the building, he was still liable for mechanic's liens as the mechanics and materialmen had a right to suppose that under the contract as filed the last payment would not be made until after the architect made his final certificate, *Daly v. Somers Lumber Co.*, 70 N. J. Eq. 343, 61 Atl. 730.

Application of payments. A payment made by the owner of a building to a materialman may not be applied on the latter's general account with the contractor but must be applied on the liability of the owner, *Leer Storz Brewing Co.*, (Neb. 1905) 106 N. W. 220. Where the owner of a building in process of construction made a payment without any specific application thereof either to work done under a written contract for which there was a mechanic's lien or that done under oral orders for extras for which there was no lien, the court applied it to the work for which there was no lien, *Barbee v. Morris*, 221 Ill. 382, 77 N. E. 589. When contractors who were building several houses at once bought lumber from a planing mill and lumber company, and the owner of one of the houses paid the contractors for their services, and out of these checks the contractors paid the company a greater amount than the bill for the lumber on that particular house came to, the latter were not entitled to a mechanics' lien thereon, although they had applied these payments to debts owed them by the contractors for other accounts, *Central Lumber Co. v. Betz*, (Ky. 1906) 92 S. W. 591.

Set off. When a property owner is sued by a contractor for material used in constructing a house the chief contractor cannot charge up his own labor, the feed of his own teams or the labor of a book-keeper and foreman over the laborers as sums incurred for which the owner might have become liable for a lien on his property and which therefore the owner may set off against the lien of a materialman, *Tuck v. Moss Mfg Co.* 127 Ga. 729, 56 S. E. 1001.

Sec. 341. Sub-contractors and materialmen—Lien dependent on existence of debt from owner. The right of a sub-contractor is not affected by the fact that the principal contractor can claim no lien because nothing is due on his contract, *Taylor v. Dall Lead & Zinc Co.*, 131 Wis. 348, 111 N. W. 490. When a contract does not provide that 25 per cent. of the contract price shall not be paid for 35 days after the completion of the building in accordance with Code Civ. Proc. s. 1184, the building is liable for liens although the contractor abandoned the contract and the expense of completion used up all the surplus due the contractor. *Stimson Mill Co. v. Nolan*, (Cal. 1907) 91 Pac. 262. When L. contracted to remodel a house for \$725 but abandoned the contract after

little work and the contract was subsequently completed at an increased expense of over \$100 to the owner; then a mechanic cannot recover for work by a mechanic's lien as the owner owes nothing to L. and there is no fund for the mechanic's lien to attach to (See Civ. Code 1895, §2801) *Rowell v. Harris*, 121 Ga. 239, 48 S. E. 948.

When a contractor fails to carry out his contract, and the owner of the property does not get what he contracted for, and in fact gets nothing of any value, so that he is in no way liable to the contractor and never was liable, the sub-contractor must look to the person with whom he contracted for his pay. When therefore the agreement was that nothing was to be paid for a roof if it leaked, and it did leak, neither contractor or sub-contractor can have a mechanics' lien, *Terrell v. McHenry*, (Ky. 1905) 89 S. W. 306. A sub-contractor, to establish his right to a lien, must show that the owner is indebted to the contractor; hence where the contract provides for an architect's certificate as a condition precedent to payment the sub-contractor must show that it was given. *Chicago Lumber & Coal Co. v. Garmer*, 132 Ia. 282, 109 N. W. 780.

Sec. 342. Priorities—As against mortgagee or owner completing. Texas Revised Statutes 1895 art. 3310 as to prorating mechanics' liens irrespective of priority when the proceeds of the sale of the property is insufficient to pay all the liens, construed in connection with articles 3296, 3308, 3310, as to the form of notice to the owner, *Nichols v. Dixon*, (Tex. 1905) 89 S. W. 765.

Priorities as against mortgagee. The claims of laborers under Indiana Acts 1885, p. 36, c. 21 against a debtor whose property has passed to an assignee are not preferred to that of a prior mortgagee, *McDaniel v. Osborne*, 166 Ind. 1, 75 N. E. 647. Where the owner of land who had contracted for the construction of a building thereon knew at the time he executed a mortgage that a third person was performing labor on the building pursuant to the contract, the latter was entitled to a mechanic's lien superior to the mortgage, *McCormack v. Butland*, 191 Mass. 424, 77 N. E. 761. Kentucky Statutes 1903, section 2463, which gives mechanics and materialmen a lien superior to any incumbrance created after the commencement of the labor or furnishing of materials, provided that it shall not take precedence of a recorded mortgage un-

less the claimant of the lien before the mortgage is recorded files in the County Clerk's office a statement, construed, *Scheas v. Boston & Paris*, (Ky. 1907) 101 S. W. 942. Sess. Laws 1899, p. 148, relating to mechanics' liens, was construed as making all liens for labor commenced and material commenced to be supplied after the recording of a mortgage subsequent and inferior thereto, especially when the work and materials were furnished by persons who had no connection with the building until after the mortgages were recorded. *Pacific States Sav. L. & Bldg. Co.*, 11 Idaho 319, 83 Pac. 513. In an action to enforce a mechanics' lien the evidence was examined and held to show that on April 11 an oral contract was entered into for certain construction work upon land not at that time owned by the defendant, that on April 14 the defendant took title and on the same day gave a mortgage to a third person to secure a construction loan, and that in August of the same year a written contract for the construction work was entered into by the same parties embodying the essential terms of the oral contract; and it was held that as there was a binding contract at the time the defendant took title and his lien was not merely instantaneous the mechanics' lien of the contractor was superior to that of the interest of the mortgagee, *Libby v. Tidden*, 192 Mass. 175, 78 N. E. 313.

A provision in a mortgage given by a corporation that it shall cover property acquired afterwards by the mortgagor is valid, but where there is consent to improvements on such after acquired property a mechanic's lien has the first claim on such a property, when it provides that a mortgage to pay the cost of the improvements shall have the preference over the general mortgage, *Cummings v. Con. Mineral W. Co.*, 27 R. I. 195, 61 Atl. 353. A contractor, obtaining a mortgage on the property which he with other contractors was building, filed a bill to foreclose the property under the terms of the mortgage before the other claimants entitled to maintain mechanic's liens had recorded them, and he bought the property at his own foreclosure sale. Sections 14 and 15 of the mechanic's lien Act of June 14, 1898, P. L. p. 538 was intended to cut off just such preferential application of property subject to lien to the payment of one claim and the exclusion of the others. The foreclosure merely released all liens against the property and as much of the proceeds of the sale that was actually advanced and paid by the mortgagee and applied to the

erection of the new building. No money was advanced by the contractor and therefore all the creditors holding mechanic's liens were entitled to share ratably in the proceeds of the foreclosure sale and the mortgagee should account to them for their ratable share in the whole amount received and not the surplus alone, *Stiles & McClay v. Galbreath*, 69 N. J. Eq. 222, 60 Atl. 224.

Priorities as against owner's claim for completing. If a building contractor abandoned a building contract, his surety is liable for the owner's time in supervising the work, when he directs him to complete it, but the owner is not entitled to a preference over a materialman, *Donlan v. American & Trust Co.*, 139 N. C. 212, 51 S. E. 924. Where a contract to build a house provided that the owner should have a right to complete the building and deduct the expense from the amount due the contractor, he could enforce a mechanic's lien for the amount of the contract price less the expense of completing the work, *Sweatt v. Hunt*, 42 Wash. 96, 84 Pac. 1.

Sec. 343. Filing of lien statement—Form—Specifications. A mechanics' lien statement was held not sufficiently definite to cover the interest of the owner who had leased it for 99 years although it did cover the tenant's interest, *Provost v. Shirk*, 223 Ill. 468, 79 N. E. 178. In New York a mechanic's lien statement must state the amount of materials actually furnished at the time of its filing, *Finn v. Smith*, 186 N. Y. 465, 79 N. E. 714. A materialman's signed statement simply setting out a claim for a balance complies substantially with Ky. St. 1903, section 2468 when filed with the proper officer, *Dobson v. Thurman*, 30 Ky. Law Rep. 1331, 101 S. W. 310. A detailed statement of the amount due upon a mechanics' lien must be recorded in accordance with Louisiana Code article 3272. A statement which merely shows the total amount charged with the payments, and credits on account, is not sufficient, *Shreveport Nat. Bank v. Maples*, 119 La. 41, 43 S. 905.

Sec. 344. Filing of lien statement—Time. P. L. 1892, p. 370, s. 2, providing for filing liens, was construed to render invalid a lien claim filed more than 15 days after formal acceptance by the City of the contractor's work, *Somer's Brick*

Co. v. Souder, 70 N. J. Eq. 388, 61 Atl. 840. Where a contractor is engaged by the owner of a building to make all necessary repairs, for which he renders monthly bills for over a year, he may have a lien for only such work as he does within the 90 days next preceding the filing of the lien, Fitzpatrick v. Ernst, (Minn. 1907) 113, N. W. 4.

The time within which a lien may be filed begins at the time the material is furnished to the owner and cannot be estimated from the delivery of material ordered by the contractor for use in the building but never in fact so used, North v. Globe Fence Co., 144 Mich. 557, 108 N. W. 285. Where a contract for work in a building provided that it be completed July 1 and payments made upon architect's certificates, the last payment being 30 days after the contract was fulfilled, and the final certificate was not given until October 5, a bill to enforce the lien filed December 16, was in time under Illinois Laws, 1895, p. 225, a statute in force at the time the contract was executed. An amended bill which set forth the same cause of action, and involved the same property, building, work, price, parties, and architect's certificate, did not state a new cause of action against which limitations ran, Eisen-drath Co. v. Gebhardt, 222 Ill. 113, 78 N. E. 22. The provision of the Illinois mechanics' lien statute which provides that to establish the lien suit must be brought or notice of the lien claim filed within four months of the date when under the original contract the last payment was due and payable, construed, Bloomington Hotel Co. v. Garthwaite, 227 Ill. 613, 81 N. E. 714. Where a contract for decorating a storeroom stipulated no time for completion but after the contractor had rendered his bill the owner made objections for the purpose of obviating which the contractor did further work, a notice of intention to hold a mechanic's lien filed within 60 days of this latter work was sufficient as the delay was due to the owner, Whitcomb v. Roll, (Ind. 1907) 81 N. E. 106.

Although last items paid for. A materialman had a right to file a mechanics' lien under Wyoming Rev. St. 1899, §2893 within ninety days from the date of supplying the last item and although the last items have been paid for a lien filed within ninety days of the delivery of the last item and more than ninety days from the delivery of the materials, for which the lien was filed, is valid, Big Horn L. Co. v. Davis, 14 Wyo. 455, 84 Pac. 900.

Sec. 345. Filing of lien statement—Description of land—Separate buildings. The statement of a lien is not so defective as to defeat recovery if it covers a 12-acre tract from which the court must select one acre to be subjected to the lien, *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311, 104 N. W. 94. Where rights of no third party have intervened a liberal rule as to the sufficiency of description should be applied and it will be enough if a person familiar with the locality can identify the premises intended to be described, *Guion v. Ryckman*, (Neb. 1906) 110 N. W. 759.

Separate houses. Under Gen. Laws 1896 c. 206, s. 1, if a mechanic has built two houses which are exactly alike and are not joined together in one house, he must consider each building as a unit when he files his lien notice, making a separate one for each house and also a separate statement of the material supplied for each, *McElroy v. Keiley*, 27 R. I. 474, 60 Atl. 679. Rev. Statutes (Utah) 1898 §§1386, 1387, relating to designating separately the amount due on each house when a lien is filed covering two buildings was construed, *Eccles Lumber Co. v. Martin*, 31 Utah 241, 87 Pac. 713. Under Rev. St. 1895, Art. 3294, 3299 and 3300 a mechanic's lien may not be maintained upon three separate houses and lots for the whole price of labor and materials furnished under a contract for work on all three, where no attempt is made to show the value of the labor and material furnished for any one house, *Guaranty Sav. Loan & Investment Co. v. Cash*, (Texas. 196) 91 S. W. 781. Three buildings were erected at once, and the contractor gave the contracts to the materialmen for all three buildings without specifying what material should be used in each building. Under these circumstances it was not incumbent on the materialmen to furnish an itemized account of the material supplied for each building and the lien claim was valid when such an account was not contained in it, as it was unreasonable to require that the materialmen should know how much material went into each building, *Fulton v. Parlett & Parlett*, 104 Md. 62, 64 Atl. 58.

Sec. 346. Filing of lien statement—Mistakes in. A statement of account in a mechanics' lien proceeding knowingly made 25 per cent. too large is insufficient under the statute, *J. E. Greilick Co. v. Taylor*, 143 Mich. 704, 107 N. W. 712. A

corporation placed a mechanics' lien upon lots belonging to the "Home Brewing Company of Grafton" for building materials furnished to K., a contractor, for the alteration and construction of a building in the city of Grafton, the notice being given to and the mechanics' lien recorded in the name of the "Home Brewing Company" omitting the words "of Grafton." There were enough words left to show that the corporation sued was the one intended, therefore the variance was not fatal, *Grafton Grocery Co. v. Home Brewing Company of Grafton*, 60 W. Va. 281, 54 S. E. 349.

Sec. 347. Enforcement of lien—in general—Limitations—Part of land sold. St. 1898, Sec. 3169, 3321, 3324 and 3326, relative to foreclosure of mechanics' liens, construed, *Conn. Mut. Life Ins. Co. v. Goldsmith*, 131 Wis. 116, 111 N. W. 208. In Alabama a Justice of the Peace is without jurisdiction to hear an action to enforce a mechanics' lien for more than \$50, *Tolbert v. Falkenberry*, 147 Ala. 204, 40 S. 120.

The time within which proceedings to enforce liens must be begun is specified by R. I. Laws 1906, Ch. 1325. Sec. 6246 Rev. Codes 1905, providing that a lien shall be forfeited if no suit is begun within 30 days, construed, *Sheets v. Prosser*, (N. D. 1907) 112 N. W. 72. Where a contract for mason work provided that the work be completed December 1, 1891, and notes for 30 per cent. of the amount due be given upon the completion of the building, payable on or before one year from their date, and a contract with another for the granite work provided that it be finished 60 days from August 4, 1891, and the building on May 1, 1892, with a provision for payment similar to that contained in the first contract; under *Hurd's Rev. St. (Illinois) 1891, c. 82*, then in force, no mechanics' lien could be claimed under either contract because the time for final payment was more than one year from the completion of the contracts, *Provost v. Shirk*, 223 Ill. 468, 79 N. E. 178.

Part of land sold. Washington Laws of 1905, p. 230, c. 116 §2, providing that if the whole of a piece of land were not necessary to satisfy a mechanic's lien that a part of it might be sold, were construed not to necessitate a sale of only a part of the land when there was no evidence offered that a

part would bring enough to satisfy the liens, *Lee v. Kimball*, (Wash. 1907) 88 Pac. 1121.

Sec. 348. Enforcement of lien—Practice—Pleading—Parties. Various sections of Shannon's Tennessee Code as to the practice in enforcement of mechanics' liens, construed. In a suit by a sub-contractor both the principal contractor and the property owner must be made defendants, and an attachment must be issued, *Warner v. Yates*, (Tenn. 1907) 102 S. W. 92. In an action to foreclose a mechanics' lien a personal judgment cannot be obtained against a subsequent grantee who made no promise to pay for the labor and materials, but where upon appeal it appears that the plaintiff was entitled to a lien the judgment of the lower court may be modified by substituting a lien for the personal erroneous judgment, *Gilmour v. Colcord*, 183 N. Y. 342, 76 N. E. 273.

Amendment. Merely changing the date at which the claim for a mechanics' lien was alleged to have been filed from October to July was not the statement of a new cause of action, *Treloar v. Hamilton*, 225 Ill. 102, 80 N. E. 75.

Pleading. The attaching of a copy of the lien statement to the complaint may be sufficient to show that the statement and claim of lien were on account of the materials and labor actually furnished and thus take the place of a direct statement to that effect in the complaint, *Stewart v. Simmons*, 101 Minn. 375, 112 N. W. 282. In Mississippi where the defendant in a mechanics' lien suit pleaded payment he should have been allowed to introduce an itemized account of payments in evidence, although he did not file such account with his answer, *Easterling v. Shaifer*, (Miss. 1905) 38 S. 230.

Parties. In an action by a sub-contractor to enforce a mechanics' lien the principal contractor is a proper but not a necessary party, *Burgi v. Rudgers*, (S. D. 1906) 108 N. W. 253. B. & C. Comp. St. §5668, providing that the lessors are liable for miners' liens unless the lease has been recorded and that the lessees shall also be made parties, was construed to allow the owner to waive the right to have the lessee made a party to the suit as it was a provision for his benefit, *Lewis v. Beeman*, 46 Ore. 311, 80 Pac. 417.

Cross bill. In a suit to establish a mechanics' lien the owner may maintain a cross-bill for damages due to failure of the petitioner to construct the building according to con-

tract, *Koch v. Sumner*, 145 Mich. 358, 108 N. W. 725. Under Sec. 4771 Code Civ. Proc. cross petitioners are not entitled to stay decrees of foreclosure in mechanics' lien proceedings, *Clock v. Pahl*, (Neb. 1905) 106 N. W. 420.

MINES

Taxation of mines and mining rights, see *post* §542.

Sec. 349. Mining rights—In general. A person who acquires the right to take ore out of land takes away a part of the substance of the real estate itself, and whether the consideration be called "royalty," or by any other name, it is paid for the purchase of the substance which is taken away. Consequently, such a contract is a conveyance of a part of the real estate, and must be executed with the formalities required for conveyances of real estate, *Brooks v. Cook*, 141 Ala. 499, 38 S. 641.

Although the defendants acquired a mining claim in Mexico under an agreement to purchase from the plaintiffs and immediately changed the monuments so as to exclude a valuable body of ore and denounced the claims to the ore body and obtained patents thereon, the plaintiffs had a right to a constructive trust in the property. A court of equity having acquired jurisdiction of the person of the defendant has a right to enter a decree concerning lands in a foreign state, *Butterfield v. Nogales C. Co.* (Ariz. 1905) 80 Pac. 345.

Constitutionality of statute as to measurement of coal. Arkansas Laws 1905, p. 558 which forbids any owner or operator of a coal mine, where 10 or more men are employed underground by the quantity, from passing the output of coal mined over any screen which shall take any part from the value thereof before it has been weighed and duly credited to the employes sending the same to the surface, construed, and held constitutional. It can be sustained under the police power. "No unjust or unreasonable discrimination against one class of persons or corporations, and in favor of others can be found in this statute," *McLean v. State*, 81 Ark. 304, 98 S. W. 729.

A bill for partition of coal underlying land is defective

which alleged that the complainant while owner of the entire tract sold three-fourths of the coal, underlying, to the defendant, and that an unknown amount of coal had been mined by the defendant. It failed to show that the defendant had any interest or was a tenant in common with the complainant, *Brand v. Consolidated Coal Co.*, 219 Ill. 543, 76 N. E. 849.

When partners owned coal lands and one partner concealed material facts so he could buy out the shares of the other partners and then sell at a profit, he was treated as a trustee and compelled to refund, *McKinley v. Lynch*, 58 W. Va. 44, 51 S. E. 4. A member of a mining partnership in oil and gas lands may convey his interest without the knowledge and consent of his co-partners, and the majority interest controls the management of the property, *Blackmarr v. Williamson*, 57 W. Va. 249, 50 S. E. 254.

Action. When the defendants occupy a mine in good faith under color of title, the owners cannot recover the value of ore abstracted and converted to the use of the defendants in a transitory action as the question of title is not incidental but fundamental and cannot be litigated in a transitory action, *Ophir S. M. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70.

Sec. 350. Mining rights—Loss or forfeiture—Damages for breach of agreement.

Loss of interest. If a subscriber for a part interest in a mine repudiates his agreement and abandons his interest for 5 months while the other subscribers are spending money and discover gold in paying quantities, he has no right in equity to an interest in the mine as he did not do equity, and as his interest was forfeited under the terms of the agreement by failure to make the payments called for, *Cameron v. Burnham*, 146 Cal. 580, 80 Pac. 929. When A and B under a deed of trust to secure a mortgage took possession of a mining claim, did the assessment work and looked after the development of the property after the grantor of the trust deed had abandoned the property and had moved away from the state, he was guilty of laches after 12 years and had no right to claim possession of the property, although the deed of trust had never been properly foreclosed, *Bradley v. Johnson*, 11 Idaho 689, 83 Pac. 927. Although the defendant sank a shaft on a mine 10 feet deeper than the plaintiff had made it the defendant had no right to claim this act started the operation of the statute

of limitations in his favor, when it is not proved that the owner would have noticed the work if he had visited the property, and when the defendant did no other work on the property for over seven years, *Costello v. Muheim*, (Ariz. 1906) 84 Pac. 906. Where the plaintiff was a shareholder in a company owning a mining lease and he did not pay his assessment or make further inquiry about the mine until a year after he had been notified that the lease would be surrendered if the assessments were not paid, he has no right to demand a share in a new lease made to some of the other shareholders under the old lease when no fraud is shown, *Hall v. Nash*, 33 Colo. 500, 81 Pac. 249. The plaintiff owned a mining claim in common with the defendant who represented to the land department in 1892 that he was the sole owner of the claim and obtained a patent on it in 1894, but he recognized the plaintiff's interest and concealed the true state of the title from the plaintiff who trusted him until 1901, but the plaintiff had not lost his rights by laches when no work on the mine had been done and when he brought suit immediately on learning of the fraud, *Delmoe v. Long*, (Mont. 1907) 88 Pac. 778.

Forfeiture of lessee's interest. Although the minimum royalty was paid on a lease of coal lands, the lessor had a right to declare the lease forfeited if one of the conditions of the lease was broken that provided that the lease was forfeited if no coal was mined for one year, *Chauvenet v. Person*, (Pa. 1907), 66Atl. 855. Where a lessee of mining lands has agreed to pay a certain royalty every six months, the payments to begin within six months after the lease was executed, the lessor might have the lease rescinded where the lessee has neither operated the mine nor paid any royalty for a year and a half, *McIntosh v. Robb*, (Cal. 1906) 88 Pac. 517. In Missouri ejectment will lie for the recovery of leased coal lands when the deed contains a provision for forfeiture for a breach of an essential condition. When the lease obligated the lessee to enter the land and mine coal thereon so that the face of the coal on the leased land should be substantially even with the face of the coal on the lessee's own adjacent land, and the lessee knew that he was not so conducting his mining operation and was therefore aware he was violating the conditions of the lease, the lessee has no standing in a court of equity to be relieved from forfeiture, *Brooks v. Gaffin*, 192 Mo. 228, 90 S. W. 808.

Ejectment versus lessee. Where a lease for mining purposes contains a clause providing for a forfeiture for non-compliance by the lessee with its conditions, upon a breach ejectment lies to recover the land, *Brooks v. Gaffin*, 196 Mo. 351, 95 S. W. 418.

Lessee's right to abandon. Where a mining lease provided that the lessee should pay so much per ton royalty and that not less than 100 tons per month should be mined provided there were that much merchantable ore that could be mined at a reasonable cost, the lessee could not abandon the lease unless he could show by a preponderance of expert testimony that the amount of ore available was less than the required amounts, *Big S. G. Iron Co. v. Olinger*, 104 Va. 261, 51 S. E. 355.

Damages for breach. The plaintiffs entered on mining land under a lease, but when they encountered valuable bodies of ore the lessors interfered with their work and the lessees were entitled to a judgment for the value of the ore which they would have mined if they had not been interfered with, *Isabelle Gold Min. Co. v. Glenn*, 37 Colo. 165, 86 Pac. 349. Where an option to purchase a mine provided that the defendant should do so much work per day on the property and that all payments made on the purchase price should be forfeited as liquidated damages in case of a breach of the contract, the owner had no right to claim additional damages for failure to perform the amount of work agreed on, *K. P. Min. Co. v. Jacobson*, 30 Utah 115, 83 Pac. 728. When the defendant in ejectment to recover mineral rights had leased them to a mining company the royalty received by him thereunder was a proper measure of damages recoverable as mesne profits, *Rebston v. Rebston*, 45 Fla. 700, 39 S. 160.

Sec. 351. Mining claims—Successive locations—Extent—By public officers—Discovery of ore. Rev. St. U. S. §2326 [U. S. Comp. St. 1901 p. 1430] relating to a mining location, was construed, *Slothower v. Hunter*, (Wyo. 1906) 88 Pac. 36. Rev. St. 1901, Par. 3241, was construed to render a mining location on an abandoned mining claim voidable when it did not state that it was on all or part of an abandoned location, but it could be amended if no other rights intervened, *Kinney v. Lundy*, (Ariz. 1907) 89 Pac. 496.

Successive locations. The relocater of an abandoned

mining claim has the burden of proof on him to show that a prior locator has abandoned his claim or has failed to make a valid location, *Cunningham v. Pirrung*, (Ariz. 1905) 80 Pac. 329. When an original location of a mining claim was void because the required work was not performed on the claim as the owner only worked on it until 12 o'clock midnight of the day on which the location was made, subsequent locators were not compelled to file the location as an abandoned claim in accordance with the provisions of the Act of 1899, p. 71, par. 8, *Paragon Mining & Dev. Co. v. Stevens C. E. Co.*, (Wash. 1906) 87 Pac. 1068.

Extent of claims. Rev. St. U. S. s. 2320 (U. S. Comp. St. 1901, p. 1424) was construed to render a mining claim staked out more than 300 feet on each side of the vein void for the excess beyond 300 feet, but otherwise valid and the line could be relocated, *McElligott v. Krogh*, (Cal. 1907) 90 Pac. 823. Rev. St. U. S. 2333 [U. S. Comp. St. 1901, p. 1433] providing that a placer location or patent shall not include a vein or lode if such vein or lode is known at the time of filing the application, was construed as rendering such a vein subject to location by an adverse claimant if it was known to the placer claimant, or a matter of general knowledge, or when the necessary examination of the placer claim by the claimant would have disclosed the existence of the vein, *Mutchmar v. McCarthy*, 149 Cal. 603, 87 Pac. 85. Revised St. 1899, §§ 2546, 2547 was construed to render a certificate of a mining location void which did not give the length of the vein on either side from the center of the shaft where the vein was discovered, *Slothower v. Hunter*, (Wyo. 1906) 88 Pac. 36.

By public officers. Rev. St. U. S. Sec. 452 was construed to allow a deputy United States mineral surveyor to locate and obtain a patent on mineral lands, although the officers, clerks and employes were prohibited from acquiring any interest in the public lands, *Hand v. Cook*, (Nev. 1907) 92 Pac. 3.

Discovery of ore. Where certain porphyry and granite formations appear in which mines have been located in other sections that is not sufficient to give a right to a valid location but there must be an actual discovery of the mineral, although the courts will regard the evidence proving the discovery of ore by a senior contestant to a mining location in a very favorable light, *Ambergis Min. Co. v. Day*, 12 Idaho, 108, 85

Pac. 110. If the locator of a mining claim has not made a discovery cut within the time prescribed by the law, the plaintiff may locate a claim as on other government lands, because the absence of a discovery cut renders the location of the defendant invalid, *Walsh v. Henry*, (Colo. 1906) 88 Pac. 449.

Sec. 352. Mining locations—Marking boundaries—Notice of location. Mining Law May 10, 1872, 17 Stat. 91, c. 152, was construed regarding the discovery and marking the location of a mining claim. For a full discussion of the sufficiency of the marking of the boundaries of a claim in an action for trespass see *Daggett v. Yreka, Min. & Mill. Co.*, 149 Cal. 357, 86 Pac. 968. When there is a conflict between the monuments as located and their position as shown in the location certificate the monuments govern, but if the courses or distances cannot be accurately determined by the stakes, the calls as given in the location certificate control the determination of the boundary. *Treadwell v. Marrs*, (Ariz. 1905) 83 Pac. 350.

Comp Laws s. 2286, requiring the locator of a mining claim to post the notice of location in a conspicuous place on the claim, was construed as rendering invalid a claim which did not have such a notice posted. For a full discussion see *Upton v. Santa Rita Min. Co.*, (N. M. 1907) 89 Pac. 275.

Sec. 353. Mining claims—"Law of the apex". For a full discussion of the rights of locators of a mining claim in regard to the apex, and extra-lateral rights reserved by Rev. St. U. S. §2322, [U. S. Comp. St. 1901, p. 1425], and the determination of a vein or lode see *Grand Central Min. Co. v. Mammoth Min. Co.*, 29 Utah 490, 83 Pac. 648.

Sec. 354. Mining claims—Abandonment—Conflicting locations. When A and B were experienced miners and knew how to mark out a claim, they were estopped from setting up a claim of ownership in a mine located by an inexperienced miner on a part of their claim, which they allowed him to improve and spend \$8,000 on, as their actions amounted to abandonment, *Sharkey v. Candiani*, 48 Ore. 112, 85 Pac. 219. The abandonment of a mining claim within the meaning of the statute is leaving it without the intention to return, but when the owners of a claim had worked on it a little for ten years

so that it was proved that there was a valuable coal mine on the property, an entry by an adverse claimant while the owners were temporarily absent did not give any rights to the property, *Davis v. Dennis*, 43 Wash. 54, 85 Pac. 1079. When a mining location has been filed on a claim which on survey is found to be part of a previously located claim, and the plaintiff posted a notice that they abandoned work on that part of the claim, they did not necessarily abandon all their rights under the location as to other ground, and a notice of relocation stating that it was made "better to describe the locus of said lode claim" was valid as no intervening rights were prejudiced, *Ford v. Campbell*, (Nev. 1907) 92 Pac. 206.

Sec. 355. Mining claims—Doing required work—Forfeiture and relocation—Co-owners. As to effect of affidavit of performance of work on mining claim and manner of making a location see *Ariz. Laws of 1907, Ch. 22. Rev. St. U. S. s. 2324 (U. S. Comp. St. 1901, s. 1433)* relating to the annual assessment work each year, renders the claim subject to forfeiture and relocation if the work is not done, but improvements designed to benefit a number of adjoining claims may be considered when the amount of work on each claim is determined, *Upton v. Santa Rita Mining Co.*, (N. M. 1907) 89 Pac. 275.

If a mine owner only pays a watchman to see that none of the machinery, etc., is stolen, such payments cannot be credited as work on the mine in compliance with the statutes, and where work was suspended for four years the mine was open to relocation, *Gear v. Ford*, (Cal. 1906) 88 Pac. 600. *Pol. Code s. 3611* was construed to render a discovery shaft cross-cutting the lode reached through a shaft from an adjoining patented claim insufficient to meet the requirements of the above statute, and when no other work was done the location was invalid, *Butte Consol. Min. Co. v. Barker*, (Mont. 1907) 89 Pac. 302. In ejectment for a mining claim which was claimed to have been forfeited because assessment work of the value of \$100, was not done thereon during a certain year when a witness testified that he had done \$200. worth of such work, and stated on cross-examination that a small part of this was done on another claim, certified copies of his affidavits filed with the U. S. General Land Office showing that the work in question had all been done on the other claim,

are admissible, *White River Mining Co. v. Langston*, 76 Ark. 420, 88 S. W. 971. Rev. St. U. S. §2324 [U. S. Comp. St. 1901, p. 1426 and 1427] and 18 St. 315 were construed as granting the owner of a mine a right to count work on a tunnel through land he did not own as part of the assessment work on the claim when it was for the purpose of developing the mine, *Hain v. Mattes*, 34 Colo. 345, 83 Pac. 127. Rev. St. U. S. §2324 [U. S. Comp. St. 1907, p. 1426], relating to forfeiture of a mining claim upon proof that the requisite assessment work had not been completed, was construed as allowing an adverse claimant to relocate the claim on the production of convincing proof that the assessment work had not been completed, although the original locator was still in possession, *Goldberg v. Braschi*, 146 Cal. 708, 81 Pac. 23.

Co-owners. Rev. St. U. S. §2324 [U. S. Comp. St. 1901, p. 1426] was construed to give a co-owner of a mining claim who has made improvements the right to serve notice on the other co-owner to pay his proportionate share or have his rights defaulted within 90 days, but a notice which does not contain the name of the co-owner is invalid, *Ballard v. Golob*, 34 Colo. 417, 83 Pac. 376.

Sec. 356. Mining agreements—Royalty. A lease was held not to require payment for coal which could not be mined by reasonable effort in *Wilson v. Big Joe Block Coal Co.*, (Ia. 1907) 112 N. W. 89. A lessor of a mining lease entitled to a royalty but no lien therefor could not in equity enforce a prior lien for royalties due from the tenant and his assignee for the benefit of creditors, *Etowah Min. Co. v. Wills Valley Min. Co.* 143 Ala. 623, 39 S. 336. When the lessees under a mining lease who were to pay a royalty upon all coal which did not pass through a certain bar screen on the premises substituted a shaker screen, so called, without the lessor's consent, he was entitled to an injunction against the further use of the new screen, *Drake v. Black Diamond Coal Co.*, (Ky. 1905) 89 S. W. 545.

Where pending litigation as to the boundary between adjoining coal mines one party extracted coal in pursuance of an agreement to account therefor if the other party were successful in the suit, the party so extracting was liable only for a reasonable royalty on the coal removed, *Sandy River C. Coal Co. v. White House Coal Co.*, 31 Ky. Law Rep. 374, 101

S. W. 319. In an action by a lessor in a coal lease to recover from a lessee who had never taken actual possession of the leased premises, the lessee bound himself for the term of the lease "to pay to the lessors after a certain date the sum of \$5,000 per annum as a minimum royalty or rental for the property, whether the quantity of coal mined and coke manufactured shall produce that amount of royalty or not." The clause in the agreement provided that "in case of failure to comply with the provisions of this lease as to the payment of royalties, or as to the development of said property, then this lease shall become forfeited and utterly void," does not release the lessee from the obligation to pay the stipulated amount, *Lawson v. Williamson Coal & Coke Co.*, 61 W. Va. 669, 57 S. E. 258. Where the rental or royalty per ton under a lease of coal lands was seven cents but the lessee was to be permitted to deduct one cent per ton until sufficient tonnage had been mined to repay the lessee for the cost of constructing a branch railroad to the mine, and after the lessee had completed the branch the railroad with which it connected repaid the lessee the cost of the branch under the provisions of a contract between them whereby the lessee agreed to ship sufficient coal within six years to equal at five cents a ton the cost of the construction of the branch and further agreed to ship all of its coal over that railroad alone for a period of twenty years, it was held that the lessee could not be said to have been reimbursed for nothing by the railroad for the money it spent in building the branch. The lessee did the work at the outset and later, by entering into the contract with the railroad, gave a valuable consideration in return for being repaid for the sums it had already spent. In calculating the royalty due the landlord, therefore, one-half of the cost of the branch must be credited to the lessee, *Alabama Mineral Land Co. v. Blocton-Cahaba Coal Co.*, (Ala. 1907) 43 S. 831.

Where a lease contained a covenant that the defendant shall mine and ship 30,000 tons of coal each year from coal lands and shall pay a royalty of six cents per ton whether the coal is mined or not "unless prevented by faults in the strata or unforeseen difficulties in the mines," etc., the lessor did not lose his right to the royalty although the lessee was prevented by faults in the strata from entering the mine through an adjoining mine, as it was the evident intention of the parties, in the absence of evidence to the contrary, to enter

the mine on the property itself. If a subsequent entry on the property proves there are no faults in the veins the defendant has no possible ground for not paying the royalties for the first year as agreed, *Troxell v. Anderson M. C. Co.*, 213 Pa. 475, 62 Atl. 1083. Where a lease of coal lands provided that a certain minimum royalty should be paid, and that for all the coal passing over a five-eighths of an inch screen, the lessors should receive a certain royalty, the lessees were compelled to pay royalty on all the coal consumed under the boilers by the company in operating the mine. The evidence showed that owing to a change in the methods of preparing the coal that a smaller proportion passed over the screen, and that the lessees were able to market smaller sizes of coal which formerly was thrown away when it fell through the five-eighths of an inch screen, and the lessors were compelled to account for the royalty on the increased percentage of coal; that is, when 15 per cent. of the coal fell through the screen at the time the lease was made, and 26 per cent. at the time the suit was brought, the lessees were compelled to pay royalty on all coal falling through the screen more than 15 per cent. The lessees were not entitled to mine inferior seams of coal, which would formerly have been wasted, without paying royalty, as the lease provided that the coal should be mined in a prudent and careful manner without waste, *Hoyt v. Kingston Coal Co.*, 212 Pa. 205, 61 Atl. 885. The lessee obtained a lease of one tract of coal lands with a stipulation that one shaft should be sunk in the tract, and then he obtained a similar lease of another tract with a covenant that he should take from the tract at least 100,000 tons minimum royalty or pay royalty on that quantity whether taken out or not, "unless a serious fault in the mine or other unusual or unforeseen occurrence or inability to obtain sufficient transportation," etc., "should justify a prudent operator in restricting the output of the mine. The lessee did not sink his second shaft on the property covered by the second lease at all, but he found faults preventing his mining coal in the second shaft sunk on the land covered by the first lease, but that was no defence to a suit for the minimum royalty on the second tract as no effort had been made to develop it, and consequently it was impossible for the lessee to set up as a defence that there were faults in the coal, *Dorris v. Morrisdale Coal Co.*, 215 Pa. 638, 64 Atl. 855.

Where under the provisions of a coal mine lease the lessor was entitled to a certain sum per ton for the coal which the lessee accepted as merchantable, any culm which the lessee did not accept becoming the property of the lessor, the lessee, by mingling the culm with that obtained from other mines, together with its taking unqualified possession and exercising full and exclusive dominion over the same, and depriving the lessor of the power of asserting her ownership of the culm, had thereby exercised its option in favor of taking all of the material mined as merchantable coal under the lease, *Genet v. D. & H. Canal Co.*, 196 N. Y. 422, 79 N. E. 437. A lease of coal mines provided for an advance royalty for the first two years and then for a minimum one. No coal was mined until the third year. Held—The advance royalty should be applied on those actually earned thereafter, and not on the excess earned over the royalty guaranteed, *Kissick v. Bolton*, (Ia. 1907) 112 N. W. 95. A lease of coal mines provided for an advance royalty for the first two years and then for a minimum one. No coal was mined until the third year but during the two years the operator paid the owner enough to cover the advances required. Held—This agreement intended that the advance royalty should be applied on royalties actually earned thereafter, and that the owner was entitled to no further payments until these had been exhausted, save the the royalties earned after the first two years should equal the minimum required, *Kissick v. Bolton*, (Ia. 1907) 112 N. W. 95.

Sec. 357. Mining agreements—Construction and effect of. Statutes.

Openings. Alabama Code 1896 section 2961 which provides that a mine shall have "At least two available openings to the surface from each seam or stratum of coal worked" is not complied with by one opening with two parts divided by a thin partition wall, *Howells Mining Co. v. Gray*, (Ala. 1906) 42 S. 448.

Where no obligation to mine. Where a lease of mining property placed no obligation upon the lessee to mine any minerals at all because operation was to be begun at his discretion and "no cessation of operation in mining" worked a forfeiture, the lease amounted merely to an option based upon no consideration, and could be withdrawn at any time before

money was expended in doing what was optional upon the part of the lessee, *Collins v. Smith*, (Ala. 1907) 43 S. 838.

Size of coal removable. A lessee under a lease of coal lands which provided that he be permitted to remove 100,000 tons of coal "of a size which would pass over a screen of 5-8 inch mesh in each and every year of said term," could only remove such broken coal mined by him as would pass over a mesh of that size, *Hollenback Coal Co. v. Lehigh &c. Coal Co.*, (Penn. 1907) 67 Atl. 987.

Timber cutting. A deed of mining rights reserved the timber to A but contained an addendum that it "is only intended to allow to A the privilege of cutting and removing such timber as he may want without hindrance," but it was not "intended to prevent B, also to cut and use whatsoever timber he may want from time to time." The purpose of this addendum was to grant to B the right to use any timber he needed to develop his mining rights purchased from A, but B could not cut timber for any other purpose or restrain the cutting of timber by A, *Shenandoah Land & Anthracite Coal Co. v. Clarke*, 106 Va. 100, 55 S. E. 561. When a lease of mining property grants also the right to use timber in building railroads it does not carry with it a right to cut timber for buildings although buildings are left on the premises at the expiration of the lease. *Lewis v. Virginia-Carolina Chemical Co.*, 69 S. C. 364, 48 S. E. 280.

Land included. A contract for the sale of real estate provided for the sale of a 38-acre tract of land, and it provided for the sale of 27 acres of coal, the amount of which was guaranteed. When it was proved that the parties knew of only one vein of coal a court of equity would not compel the conveyance of more than 27 acres of the known vein of coal as stipulated. *Armstrong v. Ross*, 61 W. Va. 38, 55 S. E. 895.

Rescission. A contract to mine all the coal within a certain area at a definite sum, 5 per cent. of which was to be retained until all the coal was mined, may be superseded by a new contract to mine for only one year, payment for the entire amount mined to be payable at the end of that term. The omission in the second contract of the 5 per cent. retention clause constituted good consideration for the whole agreement, *Proctor Coal Co. v. Strunk*, (Ky. 1906) 96 S. W. 603.

Right of way conveyed. Under a deed conveying min-

eral rights in certain land which contained the following clause: "The party of the second part (the grantee) shall have free access to said land from any direction by roads and other passways or means of exit and entrance," the grantee might build a tramway from the mine to a branch railway and then change its direction through the woods by cutting down undergrowth where it did no more damage than it would if a road had been built, *Duncan v. American Standard Asphalt Co.*, (Ky. 1906) 97 S. W. 392.

Title to ore. A lessor of coal land leased the coal of a seam at a stated royalty. A judgment lien against the lessor could be enforced by a sheriff's sale, and the right to collect the royalties belonged to the purchaser at the sale on execution, as the lease for six years gave the lessor a continuing interest in the land, *Gallagher v. Hicks*, (Pa. 1907) 65 Atl. 623. When the owner of coal lands agreed to sell the coal beneath the tract, receiving part payment for the property and giving a general warranty against incumbrances, his heirs were only required to convey what their ancestor owned, and when he only owned an undivided interest, they were not required to purchase the other interest. The court ordered the contract rescinded and all payments under it returned with interest, *Farber v. Blubaker Coal Co.*, (Pa. 1907) 65 Atl. 551. Where a landowner made two deeds to the same grantee of the coal and minerals under the land, one a quitclaim and the other a warranty deed, a trust deed later executed by the grantee containing the following clause, "meaning hereby to grantall and every right and property in or in respect to coal and other mineral heretofore granted to the said" grantor, the trust deed conveyed the title conveyed by the prior warranty deed. As the warranty deed stated a consideration the recital could not be contradicted for the purpose of making it void, *Redmond v. Cass*, 226 Ill. 120, 80 N. E. 708.

Sec. 358. Separate ownership of surface and mineral estate. In an action to recover certain coal lands a deed of record may show the separation of the ownership of coal and other underlying minerals from that of the surface, following which there would be two estates to the same land, *Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.*, 105 Va. 574, 54 S. E. 593. A purchaser of the mineral lying under land takes a fee therein determinable upon the exhaustion of

the mine and includes the right to remove or use so much of the strata, above and below, as may be reasonably necessary for proper running. The space thus made is part of the property of the mine owner and may be used by him as he sees fit provided such user does not injure the surface, *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 80 N. E. 6.

As a conveyance of an undivided one-half interest in the coal under land after a conveyance of the other half severs the coal from the land, mere possession thereafter of the surface does not extend to the coal, and the holder of the title to the coal can recover in ejectment against the owner of the land unless the latter have been in adverse possession of the coal as such for the statutory period. The evidence was examined and held to show no such adverse possession, *Gordon v. Park*, 202 Mo. 236, 100 S. W. 621. A conveyance of the underlying coal with the privilege of its removal by the grantor effects a severance of the right to the surface from the right to the underlying coal and the owner of the surface can acquire no title to the coal by continued and exclusive possession of the surface and the owner of the coal loses no right through nonusage, *Wallace v. Elm Grove Coal Co.*, 58 W. Va. 449, 52 S. E. 485.

In condemnation proceedings it was held that upon the evidence there was no coal underlying the land taken. Under Illinois Constitution Articles 2, section 13 as the fee in lands so taken remains in the landowner he may later remove coal from under the land if in so doing he does not interfere with the railroad company's easement, *Eldorado &c. R. Co. v. Sims*, 228 Ill. 9, 81 N. E. 782.

Sec. 359. Support of the surface—Damages. If a grant is made of coal rights with the usual rights of mining beneath the surface of a certain tract of land, the grantee is not responsible for the subsidence of the surface and he can not be compelled to leave sufficient coal to support the ground. For a very full discussion see *Griffin v. Fairmont Coal Co.*, 59 W. Va. 486, 53 S. E. 24. The surface to land caved in on account of the careless mining operations of the defendant and if these operations occurred within six years of the time of bringing the suit the plaintiff could recover damages. *Tischler v. Penn Coal Co.*, (Pa. 1907) 66 Atl. 988.

A lease of coal lands provided that the lessors should

protect the lessees from any liability for the caving in of the surface in consequence of mining operations and gave them the right to remove all the coal, and a clause giving the lessors the right to direct that pillars should be left in certain places was construed as intended to protect the mine so the largest amount of coal could be obtained and it left the lessees the right to remove the pillars when all the coal was taken from the mine, *Miles v. Penn Coal Co.*, (Pa. 1907) 66 Atl. 764. B bought a coal vein of A with the right to carry away the coal, and then B sold the coal to C with a guarantee to indemnify C for any damages to the surface of the land occasioned by careful and skilful mining. C mined all the coal including the supports so that the surface sank and cracked and the owner of the surface obtained a judgment against C for damages and B under his covenant of warranty had to indemnify C as careful and skillful mining "did not necessitate that C should leave supports for the surface of the land," and C had a right to remove all the coal provided the work was done skilfully, *Youghiogeny River Coal Co. v. Allegheny Nat. Bank*, 211 Pa. 319, 60 Atl. 924. Where the agents of the lessor of a coal vein went frequently into the mines and knew that all the coal was being mined and the lessor with this knowledge received royalties on the coal mined which should have remained as supports to the surface, he was liable for damages caused by the sinking of the surface, *Campbell v. Louisville C. M. Co.*, (Colo. 1907) 89 Pac. 767. 2 Mills Ann. St. s. 3139, 3159, 3620, providing that the owner of minerals may be compelled to furnish bonds against damage to the surface in removing the minerals, does not release the owner of the mineral estate from liability if the bond is not demanded, as the provision is for the benefit of the owner of the surface which he may waive, *Campbell v. Louisville C. M. Co.*, (Colo. 1907) 89 Pac. 767.

When one co-tenant to a mine working at a certain level allows the ground to cave in and cover up the ore belonging to another co-tenant working on a lower level the landlord is not responsible for his negligence when the ordinary careful working of the mine would not necessarily have caused such an injury to the plaintiff, *Peterson v. Bullion-Beck & C. Mining Co.*, (Utah 1907) 91 Pac. 1095.

The measure of damages to the owner of a farm due to the sinking of the surface caused by the failure of the owner

of the mining rights to leave sufficient support for the surface when removing the ore, is the amount of the depreciation of the property as regards farming purposes or for building, including the actual cost of necessary repairs to a house due to its sinking, and on account of cracks in the walls, etc. Where a spring was permanently destroyed the measure of damages was the cost of the piping to convey water from another spring, *Rabe v. Schoenberger Coal Co.*, 213 Pa. 252, 62 Atl. 854. When springs have been destroyed by legitimate mining operations the owner of the surface has no right to damages, but, if the removal of the supports in the mine and the subsidence of the surface caused the destruction of the springs, damages may be assessed. The total damage to the surface cannot be more than its market value, *Weaver v. Berwind-White Coal Co.*, (Pa. 1907) 65 Atl. 545.

MORTGAGES

Rights of mortgagees on taking by eminent domain, see *ante* §136.

Mortgage by executor, see *ante* §169.

Fixtures as between mortgagor and mortgagee, see *ante* §194.

Rights of mortgagor and mortgagee in insurance policy, see *ante* §270.

Rights of mortgagee as against mechanics' liens, see *ante* §342.

Recording of mortgages, see *post* RECORDS AND RECORDING.

Statute of limitations as applied to, see *post* §513.

Taxation of, see *post* §540.

Sec. 360. Validity—Legality of consideration—What law governs—To take effect on death. An owner of a mine gave a power of attorney to mortgage the property to an amount not exceeding \$200,000, and as his attorney made a detailed report on the transaction to his principal, he was estopped from objecting that he had not given him authority to raise money to pay debts previously existing against the receiver or liens on the property when he made no objections

to the payments until after the foreclosure of the mortgage. *Curtze v. Iron D. C. M. Co.*, 46 Ore. 601, 81 Pac. 815.

According to const. Cal. Art. 4 §26, all contracts for the sale of stock at a future date are void, and therefore a mortgage on mining property in Wyoming is void to the amount for which such transactions form the consideration, but when the stock is ultimately delivered and paid for in full, the previous transactions and payments in regards to that stock are legalized and form a valid and enforceable part of the consideration for the mortgages, *Conrad v. Lepper*, 13 Wyo. 473, 81 Pac. 307.

If an agent represents to defendant, that the plaintiff will prosecute criminally her son for obtaining goods under false pretences, unless a mortgage and note are executed to the plaintiff, the consideration for the mortgage is unlawful and the mortgage is void, *Corbett v. Clute*, 137 N. C. 546, 50 S. E. 216.

A mortgage was executed by the owner of real estate to secure the payment of certain sums after her death, which the mortgagee, her daughter, promised to do. The mortgagor was aged and in poor health and the mortgage was not to be recorded until she directed—this was done on the day of her death. Held—The note in fact created no indebtedness, but provided for the distribution of money after the maker's death; hence was testamentary. No heir was created by the mortgage, *McCourt v. Peppard*, 126 Wis. 326, 105 N. W. 809.

What law governs. Where a foreign building association advances money to one of its members and the bond provides that the contract be governed "by the laws of Georgia" it will be so construed, *Equitable Building & Loan Ass'n v. Corley*, 72 S. C. 404, 52 S. E. 48.

Sec. 361. Delivery.

Delivery of deeds, see *ante* §§73-76. Although certain mortgage notes were not delivered, payments made on part of them before such delivery constituted a waiver of delivery, and the balance of the notes could be collected, *Moyer v. Dodson*, 212 Pa. 344, 61 Atl. 937.

Sec. 362. Amount secured—Attempts to add simple contract debts—Interest payable—Usury. When a husband has the record title to property although his wife owns a

secret equity, the grantee of a security deed from the husband has a valid lien when the husband represents that the property is his own, but the grantee cannot subject the property to the payment of other debts of the husband, which it acquired not directly in consequence of the husband's property, *Austin v. Southern H. B. & L. Ass'n*, 122 Ga. 439, 50 S. E. 382.

When a deed is deposited with a bank to be held as security for a loan, the grantor or his assignee is entitled to a reconveyance upon payment of the amount due on the note, even when the bank holds another note which, without giving a sufficient description of the land, gives a lien on all the securities, etc., held by the bank, *Fleming v. Georgia R. R. Bank*, 120 Ga. 1023, 48 S. E. 420. The owner of land executed a deed of the land as a security for a loan, and then borrowed more money. His heirs petitioned in equity for a reconveyance of the land as the original loan for which the deed had been delivered was paid. The Supreme Court granted the petition, provided the rest of the indebtedness were paid within a specified time which was constructively secured by the deed. As it was not paid a sale of the land was held, *Hallman v. George*, 70 S. C. 403, 50 S. E. 24.

Interest. If a mortgage note reads that the holder shall have the right to declare the whole amount due on failure to pay any installment of interest and that after the whole amount is due the mortgagee may collect 12 per cent. interest, the mortgagee has no right to claim 12 per cent. interest from the time the interest became delinquent, when he did not declare the whole amount due until seven years afterwards. *First Nat. Bank of Greeley v. Park*, 37 Colo. 303, 86 Pac. 106. When the holder of a 10 per cent. mortgage note indorses an agreement on it to accept eight per cent. interest, and subsequently crosses out the indorsement, the interest runs at the legal rate of 7 per cent, *Edwards v. Sartor*, 69 S. C. 540, 48 S. E. 537. Where a spendthrift husband made a usurious mortgage and later conveyed the property to his wife who paid no value therefor and took title to prevent her husband from dissipating it, she was not estopped to set up the usury, *First Nat. Bank v. Drew*. 226 Ill. 622, 80 N. E. 1082.

Sec. 363. After-acquired property. Under a mortgage by a tenant of the 5-year leasehold "and all the buildings and

improvements on said lot of ground which will be put thereon by said first party during the term of said lease" and "also all the personal property, fixtures, and machinery belonging to said first party" the mortgagee could hold after acquired heavy machinery and a boiler set firmly in the ground and used as a part of the manufacturing plant. *McClung et al. v. Quincy Carriage Co.*, (Tenn. 1906) 96 S. W. 960.

Sec. 364. Tax title or deed—Effect of acquiring. When the owner of property covered by a mortgage fails to pay taxes and afterwards buys in the property at a sheriff's sale to foreclose the tax lien, he has no right to set up his tax deed against the rights of the mortgagor, *Gibson v. Gilman*, 71 Kan. 320, 80 Pac. 587. Notes issued by a corporation and secured by mortgage of its property were given to a creditor and to a third person, who subsequently acquired title to the mortgaged property, subject to taxes, liens and incumbrances. Held—That the third person who had notice of the creditor's claim could not take to himself a tax deed and cut off the creditor's rights; he was in the position of a mortgagee in possession and took title with knowledge that the notes were outstanding, and as he might protect himself by redeeming from the tax sale, it would be inequitable to permit him, by the expenditure of no larger sum than would be necessary to pay the taxes, to exclude his fellow lienholders from participation in the common fund, *Gilman v. Heitman*, (Ia. 1907) 113 N. W. 932.

Sec. 365. Mutual rights of parties. Under Kentucky Statutes 1903 section 11 giving any person having legal title and possession of land the right to sue in equity to establish his title against third parties claiming it, a mortgagor in possession may sue the mortgagee, *Sheffield v. Day*, (Ky. 1906) 90 S. W. 545.

If a lessor of a mortgagor street railway corporation, owning terminal land covered by the mortgage, makes an agreement whereby the value of the property will be decreased by permitting competing lines to enter the terminal so the earnings of the company will not be so great, or which will decrease the terminal facilities of the company to its disadvantage, an injunction may be granted at the request of the

mortgagee, *Fidelity Trust Co. v. Hoboken & M. R. Co.*, (N. J. Ch. Eq. 1906) 63 Atl. 273.

Sec. 366. Fraud. When the complainant in possession of land alleged that a mortgage executed by her and assigned to the defendants for value was invalid and she thereafter executed a deed to the defendants which was void for fraud she was entitled to maintain her bill and thus protect her equitable rights against the defendant's action of ejectment, *Hudson v. Jackson*, 144 Ala. 410, 39 S. 227. B was a creditor of a mining company, but as the evidence introduced was insufficient to prove that he used fraudulent representations to induce A to buy stock in the company, the mortgage given B by A to secure the purchase of the stock was not void, although B was paid the entire proceeds of the sale in part payment of the indebtedness of the company to him. *Smith v. Krueger*, (N. J. Ch. 1906), 63 Atl. 850.

Sec. 367. Construction of particular clauses. For a case where a contract between an insurance company and its agent was held to be part of a mortgage given by the latter to the former contemporaneously with the execution of the contract see *Security Trust & Life Ins. Co. v. Ellsworth*, 129 Wis. 349, 109 N. W. 125. The clause "when the same become payable" as applicable to taxes, held to mean payable to the mortgagee to reimburse him for payment to the collector, *Union Trust Co. v. Grant*, 148 Mich. 501, 111 N. W. 1039. Evidence held to show that a mortgagor of a canal and various rights reserved in the mortgage the privilege of leasing the property for the benefit of the mortgagee and thus binding him by such lease, see *Sammons v. Kearney Power and Irrigation Co.*, (Neb. 1906) 110 N. W. 308.

Sec. 368. Husband and wife—Subrogation as to. Where a married woman joined with her husband in a mortgage of his land, her administrator with the will annexed may maintain a bill for exoneration against the executors of the will of her husband, *Browne v. Bixby*, 190 Mass. 69, 76 N. E. 454. Where a husband buys land in his own name but really as agent for his wife and partly with her money, giving notes for the balance secured by mortgage on the property, and certain of the notes are assigned to her at her request, in a foreclos-

ure proceeding she is not entitled by cross-bill to have the notes so assigned given priority in payment to the notes held by the seller. But as far as the latter is concerned her debts will be deemed to have been paid, because it was her duty as the actual purchaser to pay them, *Polk County Nat. Bank v. Darrah*, (Fla. 1906) 42 S. 323.

A husband and wife mortgaged their homestead to a bank and when the mortgage note fell due a third person, at the request of the husband, paid it and accepted delivery from the bank of the note and mortgage. Later the third person surrendered them to the husband for a new mortgage on the land which purported to be, but was not in fact, signed by the wife. It was held that the third party, although not the assignee of the original mortgage, was subrogated to his rights thereunder and entitled to a lien on the land for the amount of the note paid by him, *Davies v. Pugh*, 81 Ark. 253, 99 S. W. 78.

Sec. 369. Subrogation to rights in mortgages. When an owner made a mortgage and later one who did not own the entire interest made another mortgage with the proceeds of which the first one was paid off, the second mortgage is subrogated to the lien of the first, *Ligon v. Barton*, 88 Miss. 135, 40 S. 555. Although an order of court granting a guardian leave to execute a mortgage on property and the mortgage itself were void, the mortgagee who advanced his money in good faith to the estate to prevent loss by the foreclosure of a prior mortgage had a right to be subrogated to the rights of the prior mortgagee, *Wilson v. Wilson*, 39 Wash. 671, 82 Pac. 154. When a person loaned money upon a mortgage made by a curator of a ward's estate which was void because made for the purpose of taking up an old mortgage the lender was not entitled to be subrogated to the rights of the mortgagee under the old mortgage, *Capen v. Garrison*, 193 Mo. 335, 92 S. W. 388.

A promise by a widow and executrix having a life estate in mortgaged premises to give a third person, who advances money to pay the mortgage, a mortgage amounting to "a lien upon said property," gives him one on the life estate only, and entitles him to be subrogated to the rights of the prior mortgagee, *Hughes v. Thomas*, 131 Wis. 315, 111 N. W. 474. A mother purchased land and received a deed to herself and her

children in the usual form with general warranty, giving therefor her bond and a mortgage secured on the land. Later the mother sold the land, executing a deed therefor that purported to convey full title but which disregarded the interests of her children. The purchaser assumed the payment of a mortgage upon the property as a part of the purchase price. There is no principle of subrogation applicable to this mortgage to the exclusion of the children, *Coleman v. Coleman*, 74 S. C. 567, 54 S. E. 758. Where a will contained a devise to the testator's sister for life with a remainder over to a university it was held that when the life tenant, while she occupies the premises, had paid part of the principal due upon a mortgage thereon executed by the testator her estate was entitled to that amount to be subrogated to the lien of the mortgagee as against the remainder man, *Cumberland University v. Roberson*, (Ky. 1907) 99 S. W. 1152. A, B, and C as tenants in common of a farm executed a mortgage on it to D and after a few years D commenced foreclosure proceedings for non-payment of the interest. B's interest had been sold at a sheriff's sale and purchased by E, but when E repaid the mortgage just previous to the sale and objected to the release of the mortgage telling D that he wanted an assignment of it, the fact that D released the mortgage in C's presence did not bar C's right to be subrogated to the rights of the mortgagee against E. *Parsons v. Urie*, 104 Md. 238, 64 Atl. 927.

When the purchaser of land who had assumed a first mortgage but not the second thereon, paid off the first mortgage, had the note assigned to him, and later reassigned it to the complainant without consideration and thereupon the latter foreclosed the first mortgage, it was held that the first mortgage debt was extinguished when the purchaser paid it and the complainant was not entitled to subrogation when the result would be the defeat of the lien of the second mortgage, *Ramoned Bros. v. Loggins*, 89 Miss. 225, 42 S. 669. In a mortgage given to a surety by a principal to secure the payment of the debt the creditor has an interest which the surety cannot destroy, but in one given the surety merely to indemnify him the creditor takes no equitable interest until the principal becomes insolvent. Until this time the surety may release the security. Such an equitable right of subrogation to the

security will be lost, after a delay of 20 years, by laches, *Dyer v. Jacoway*, 76 Ark. 171, 88 S. W. 901.

Where a purchaser buying at a void sale, under the power contained in a mortgage, seeks to subrogate to himself the rights of the mortgagee, he must state in the complaint that he brought suit believing that he was acquiring legal title as well as the amount of the price, *Griffin v. Griffin*, 70 S. C. 220, 49 S. E. 561.

Sec. 370. Deeds construed as mortgages—When.

Coincident with loan. When it was proved that a wife took the title to land as security for a loan by her, the deed was construed as a mortgage and the wife's interest in the property ceased when the loan was repaid and her heirs had no title to the property, *Hubbard v. Cheney*, (Kan. 1907) 91 Pac. 793. Where the complainant procured the defendant to pay the former's debt due third persons and executed to the defendant an absolute deed as security the relation of debtor and creditor exists between the parties and equity will declare the conveyance a mortgage, *Shreve v. McGowin*, (Ala. 1904) 42 S. 94. Although the owner of land gave an absolute deed to secure a loan and placed it in escrow to be delivered in case of failure to pay the loan, the deed was construed as a mortgage and the mortgagor still had a right to redeem the property after a default in payment, *Plummer v. Ilse*, 41 Wash. 5, 82 Pac. 1009. A deed given to secure the payment of indebtedness, accompanied by a contract, executed by the grantee, for the reconveyance of the property, amounts to a mortgage and leaves the legal title in the grantor, susceptible of recognition and protection by a court of law, *Flynn v. Holmes*, 145 Mich. 606, 108 N. W. 285. In a suit to have a deed absolute on its face, declared a mortgage, where at the time of the execution of the deed, it was intended by the parties interested that the deed should be security for a debt due the grantee from the grantor, it was so declared, *Hursey v. Hursey*, 56 W. Va. 148, 49 S. E. 367. After the purchase at a judicial sale of real estate, and where by verbal agreement the debtor remained in possession, a contract of reconveyance, upon the payment of all the purchase money and a certain sum in addition, was made by the purchasers. The rights of the parties are governed by the principles of mortgagor and mortgagee, *Liskey v. Snyder*, 56 W. Va. 610, 49 S. E. 515.

When lenders of money took notes for the full amount of money advanced at the full legal rate of interest, and a deed to a half interest in oil and gas lands beside, the deed became void on the payment of the notes with interest, and an agreement to pay the value of the property deeded without consideration was usurious and void, *Davidson v. Smith*, 60 W. Va. 413, 55 S. E. 466. Where land was conveyed to a wife to be held by her until her husband could sell it and with the proceeds pay off a debt due him from the grantor, the balance to be paid to the grantor, the transaction was a mortgage, as the grantor had originally paid for the house on the land and the grantees repaired it at their own expense. The occupancy, which at the time of the deed was joint between the parties without any payment of rent, would presumably remain so, *Robinson v. Gassoway*, (Ala. 1905) 39 S. 1023.

No mortgage found. Under Code Sec. 2918 a parol agreement by the grantee of land to execute a reconveyance on the payment of the grantor's indebtedness is invalid, *Donaldson v. Empire Loan & Inv. Co.*, 130 Ia. 467, 106 N. W. 192. Where evidence shows that there was no intention that the relation of debtor and creditor should exist between the parties to a deed the transaction does not amount to a mortgage, *Lemke v. Lemke*, (Neb. 1907) 111 N. W. 138. When a grantor, a married woman, sought to have a deed, absolute on its face, declared a mortgage, and then have the mortgage declared void, because given to secure the debt of her husband, in violation of Alabama Code 1896 section 2529, the court held the evidence insufficient to show that a mortgage was intended, *Maxwell v. Herzfeld*, (Ala. 1907) 42 S. 987. A bank contracted for the sale of land, the vendees agreeing to pay in instalments and taking possession immediately. Notes were given for the instalments. These notes, with the contract, were assigned to the plaintiff to secure the defendant's debt to it, and the title was conveyed to the plaintiff. Held—The lands were held by the plaintiff in trust and must be conveyed to the purchasers on tender of the price; the plaintiff was not entitled to a decree that the deeds to it were mortgages and that they be foreclosed, *First Na. Bank v. State Bank*, (N. D. 1906) 109 N. W. 61.

Fraud. Although a sale may be made by a mortgagor to the mortgagee, yet if the mortgagee takes improper advantage of the mortgagor and induces him to make over an absolute

deed by undue influence and fraud it will be considered as a mortgage, *Wagg v. Herbert*, (Okl. 1907) 92 Pac. 250.

Purchase for another. Where a man buys property for a brother and takes an absolute deed to the property, and the brother pays him interest on the amount of the purchase price for 17 years until the death of the purchaser, and to his estate after his death, and there is evidence that the purchaser said that he held the place for his brother, who was to have it when he had paid the principal and interest, a resulting trust will be decreed in favor of the debtor establishing the relations of mortgagor and mortgagee, *Robinson v. Bonaparte*, 102 Md. 63, 61 Atl. 212.

Sec. 371. Deeds construed as mortgages—Evidence—Actions—Practice. Only clear and convincing evidence suffices to prove a deed to be a mortgage, *Jones v. Jones*, (S. D. 1906) 108 N. W. 23. The burden of proof is on the party alleging that a deed absolute on its face is a mortgage. The controlling fact is the intention of the makers of the deed at the time of making. If, after the deed is executed, no debt remains due from the grantor to the grantee, the instrument is not a mortgage, *Fridley v. Somerville*, (W. Va. 1906) 54 S. E. 502. If a deed was given merely as security the grantee became an equitable mortgagee and a person who bought at a subsequent execution sale against the grantor acquired only an equity of redemption. Such a person has the burden of proving the prior deed was intended as a mortgage, there being no evidence of fraud and no great difference between the value of the land and the amount of the grantor's debt to the grantee, *Powell v. Crow*, 204 Mo. 481, 102 S. W. 1024.

Oral evidence. Upon the oral evidence a deed absolute upon its face was held to be in fact a mortgage, *Linkeman v. Knepper*, 226 Ill. 473, 80 N. E. 1009. Parol evidence is admissible to show that a deed or other conveyance absolute in terms was intended as a security for debt. The evidence to establish this must be clear and decisive, but that is a question of quantum of evidence, and not of competency, *Reynolds v. Blanks*, 78 Ark. 527, 94 S. W. 94. When a deed is construed as a mortgage merely on parol evidence, the evidence must be very clear; and after several years had passed without any claim of a mortgage, and when the grantor said

that there was more against the land than it was worth, a sale is presumed, *Way v. Mayhugh*, 57 W. Va. 175, 50 S. E. 724. Where a purchaser from a master commissioner who had executed a surety bond for the purchase price assigned his purchase to the surety upon the latter's agreement to pay the bond, as the assignment did not cover the entire agreement between the buyer and his surety parol evidence was admissible to show that it was not an absolute conveyance but an equitable mortgage. This case seems to make a very sweeping modification on the general rule in Kentucky in such cases, *Crockett's Guardian v. Waller*, (Ky. 1906) 96 S. W. 860.

Evidence sufficient. Grantee's intention may be shown in action to have a deed declared a mortgage, *Laub v. Romans*, 131 Ia. 427, 105 N. W. 102. Where an absolute deed is made of mining property to secure an advance of \$3,000 in cash for which a note is taken in anticipation of a sale of the property, the deed may be construed as a mortgage for the total of all the amounts advanced and it may be foreclosed, *Kramer v. Wilson*, (Ore. 1907) 90 Pac. 183. "While contemporaneous conduct and declarations may doubtless be shown to prove that an absolute deed was intentionally executed, delivered and accepted as a mortgage, a debt on some other obligation to be secured must exist at the time of the transaction and nothing less than clear, certain and conclusive evidence will justify such a conclusion," *Jones v. Jones*, (S. D. 1906) 108 N. W. 23. In a suit to have a deed absolute on its face decreed to be a mortgage the fact that the plaintiff after the conveyance qualified as a surety and thereupon before the master in chancery swore that he only owned certain property, not mentioning the property conveyed, and later when he filed a bankruptcy petition failed to include the property therein as an asset of his estate, was only important as evidence upon the question of fact as to whether or not such deed was a mortgage. It did not create an estoppel as against the plaintiff, *Alexander v. Grover*, 190 Mass. 462, 77 N. E. 487.

Evidence insufficient. A deed absolute in form will not be held to be a mortgage where the grantor's testimony is inconsistent and is corroborated only by the testimony of her husband and she is of fair education and admits that she knew she was giving a deed absolute in form, *Betts v. Betts*, 132 Ia. 72, 106 N. W. 928. When the evidence is conflicting, a deed

to property which afterwards rose in value as a result of the announcement that a railroad would be located near the property, will not be construed as a mortgage if the consideration was adequate and a fair price for the land at the time the deed was executed. *Sahlin v. Gregson*, (Wash. 1907) 90 Pac. 592. When a creditor holding a mortgage on land takes an absolute conveyance and surrenders the mortgage and mortgage notes, the presumption is that the absolute deed is not a mortgage, although an option is given to purchase within three years at the amount of the debt with interest. After three years have expired the mortgagor has no right to redeem, *Dabney v. Smith*, 38 Wash. 40, 80 Pac. 199. If an heir sold his share of an estate for \$500 when it was worth \$5,000 the sale will not be cancelled if fraud is not proved and a postal card in the handwriting of the heir saying: "I will sell my share in the estate for \$500.00" is sufficient evidence that he understood it was a sale and not a loan, *Singer's Estate in re*. (Pa. 1907) 66 Atl. 548. An absolute conveyance of property in partial payment of a debt and notes for the balance absolutely due at a certain time cannot be varied by evidence of an oral agreement that if the property before the maturity of the notes increases in value to an amount equal to them they shall be delivered up and canceled. Such an agreement would not constitute an equitable mortgage, *Pearson v. Dancy*, 144 Ala. 427, 39 S. 474.

Statutes. Sec. 4730 Rev. Codes 1899, providing for notice that deeds purporting to be absolute are intended to be defeasible in certain conditions, construed, *Patnode v. Deschenes*, (N. D. 1905-6) 106 N. W. 573.

Action. To secure his rights under a deed and contract to reconvey, amounting to a mortgage, plaintiff may have complete relief in an action at law to recover the money owed, *Barchent v. Snyder*, 128 Wis. 423, 107 N. W. 329. A agreed orally to sell land to B. The bank C advanced the price, taking B's note and a deed with the grantee's name in blank. On payment of the note the title was to pass to B. Two other purchasers were in turn substituted for B, the latter becoming bankrupt. The bank then transferred the bankrupt's note and the deed to plaintiff who brought suit for foreclosure. Held—The bankrupt, and consequently his trustee, had no right to the land until the note was paid, *Beer v. Wisner*, (Neb. 1905) 104 N. W. 757.

Laches. A bill to have an absolute deed declared a mortgage which alleges that the defendant, the grantee, refused to make further loans unless the complainant would execute an absolute deed, that all he wanted was his money and complainant could have the land back any time by repaying the money, that the complainant executed the deed in reliance upon these statements and remained in possession paying a fixed sum yearly as "rent" and improved the land, should not be dismissed for want of equity. Being brought within 10 years after the deed was made it is not barred by laches, and joint tenants who have the same interest to have it declared a mortgage are proper parties plaintiff, *Gerson v. Davis*, 143 Ala. 381, 39 S. 198.

Rents and improvements. A person who conveys land and takes an agreement for reconveyance upon the payment of a certain sum when she pays that sum is entitled in equity to recover the amount of rent collected by the grantee, *Thomas v. Livingston*, 147 Ala. 200, 40 S. 504. In a suit by a plaintiff to have certain deeds declared mortgages and to redeem them, under the circumstances, although the defendant should be charged with use and occupation, this should not be computed upon the basis of compound interest by annual rents. The lower court however in its discretion could refuse to allow the defendant anything for valuable improvements made while a trespasser, *Shelley v. Cody*, 187 N. Y. 166, 79 N. E. 994.

Pleading. An allegation in a petition that a certain pretended deed was intended really as a mortgage and asking that a court of equity so decree it is demurrable because containing no allegation of a loan still due, *Jones v. Hubbard*, 193 Mo. 147, 90 S. W. 1137. A bill in equity to have a deed declared a mortgage is not multifarious because the legal title of the lots is in several different complainants, when it appears that they both were bought with the joint money of all the complainants, title taken separately by agreement, and occupied by all as a homestead. As the complainants were ignorant colored people who thought they were signing a mortgage and later paid the taxes and made improvements they were allowed to redeem, *Abercrombie v. Carpenter*, (Ala. 1907) 43 S. 746.

Parties. Complainant's husband, who made a deed to the defendant intended as a mortgage and later conveyed to his wife, was a necessary party to her suit to have the deed de-

clared a mortgage and for redemption, *Marbury Lumber Co. v. Fosey*, 142 Ala. 394, 38 S. 242.

Appeal. A suit to have an absolute deed declared a mortgage and to allow redemption, involving incidentally a cancellation of the alleged mortgagee's deed to a third person, does not involve a freehold and give the Illinois Supreme Court appellate jurisdiction, *Eddleman v. Fasig*, 218 Ill. 340, 75 N. E. 977.

Sec. 372. Absolute deed and defeasance. B obtained a loan from a seminary and gave a security deed to land. The seminary, being unable to collect the interest, levied on the land and took possession by a sheriff's deed. But the deed was void because the seminary had not had a deed of reconveyance of the land recorded before the execution was levied, *Benedict v. Gammon Theological Seminary*, 122 Ga. 412, 50 S. E. 162. When a deed has been given to A, and a defeasance has been executed reducing the deed to a mortgage and containing a clause that B shall have the right to purchase within 8 months, it will not be considered as a mortgage under the Act of June 8, 1881, (P. L. 84) unless the defeasance was signed, sealed, acknowledged and delivered by the grantee on the day of the execution of the deed, and it must be recorded within 60 days, and when it has not been recorded and the right to purchase has not been exercised B has no right to have the absolute deed construed as a mortgage, *O'Donnell v. Vandersaal*, 213 Pa. 551, 63 Atl. 60. When in order to secure a debt the grantor conveyed land, contracting with the grantee to reconvey upon payment of said debt, and grantee subsequently sold the land, it was held that the grantor may sue in equity for the proceeds, on tender of debt and refusal to reconvey but punitive damages cannot be awarded, *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232.

Informal forfeiture clause. When a deed contains a clause that on the payment of a certain sum it "shall be void" otherwise "of full force" if the sum is not paid before a given date, it is a mortgage and not a deed, and it must be foreclosed with all the formalities of a mortgage, *Scott v. Hughes*, 124 Ga. 1000, 53 S. E. 453. If the mortgagor gives an absolute deed to the mortgagee, reserving the right to repurchase the property at the price with interest and taxes which the mortgagee paid for it, the option is binding although it is

not phrased in legal terms as a right to "redeem." Although the mortgagor limited the right to repurchase by inserting the clause "if he wants to sell said farm," a court of equity will not construe that strictly when it is shown that the mortgagor did not have any advice from her friends before signing the agreement, and that it was her belief that the agreement gave her an option to purchase, *Day v. Davis*, 101 Md. 259, 61 Atl. 576. A debtor conveyed to his creditor certain real estate and executed a bill of sale of certain personal property. The bill of sale contained a recital that the creditor was to sell the property and apply it toward paying the debt. As to the real estate, the creditor executed a writing stating that the debtor was to have the exclusive right to sell the premises upon payment of the debt. The agreement contained a recital that "said conveyance was made.....to pay and satisfy an indebtedness.....and to save the cost of foreclosure" and a stipulation that "in case no sale of said premises is made.....and payment made as above stated before March 1, 1905, then this contract shall terminate and end and become null and void." The debtor did not pay the debt before March 1, 1905, but later brought an action to have the conveyances declared mortgages, and for a decree giving him the right to redeem. At the trial the creditor testified that he did not regard the debt as paid by the conveyances, but held them as security. Held—That the transaction was a mortgage and that the debtor had the right to redeem, notwithstanding the time limit named in the agreement. *Kinkead v. Peet*, (Iowa 1908) 114 N. W. 616.

Sec. 373. Mortgage distinguished from conditional sale. Where land was sold at a commissioner's sale for \$455.40 and a third person at the request of the original owner bought the land from the purchaser at the commissioner's sale for \$455.40 and agreed to reconvey the land to the original owner for that sum and interest in case payment was made on or before a certain day, the transaction was a mortgage not a conditional sale, *Sheffield v. Day*, (Ky. 1906) 90 S. W. 545.

Sec. 374. Equitable mortgages—Equitable rights in mortgages. For facts upon which a deed of timber land was found to be an equitable mortgage see *Stitt v. Rat Portage*

Lumber Co., 95 Minn. 91, 104 N. W. 561. An instrument in the form of a mortgage which was not attested or acknowledged created, however, an equitable lien upon the property, Markham v. Wallace, 147 Ala. 243, 41 S. 304. When a mortgage was neither attested or acknowledged but was intended to create a lien on the land described a court of equity will enforce it as an equitable mortgage, Courtnes v. Etheredge, (Ala. 1907) 43 S. 368. One who pays a mortgage on land to which he thinks he has a good title, when in fact he has none, becomes the equitable owner of the mortgage and may enforce it against the land, Taylor v. Roniger, 147 Mich. 99, 110 N. W. 503. When the lessees for turpentine purposes of land upon which an execution has been levied, upon being applied to for a loan to prevent a sale of the land, orally agree with some of the heirs of the execution debtor that the lessees will bid in the land at the execution sale, and upon the payment by the heirs of the amount, with interest, the lessees would reconvey the land to the heirs, and pay them the usual rent for turpentine purposes while they were held under the sheriff's deed, a trust which equity will enforce is thereby created in favor of the heirs, Patrick v. Kirkland, (Fla. 1907) 43 S. 969. Although a borrower obtained an advance from a bank under an agreement to give them a mortgage on a tract of land when he acquired title to it, his failure to give a mortgage did not operate to prevent the bank's having security as the bank had in equity an equitable mortgage, so that a prospective purchaser, when informed of the bank's interest, was charged with notice equivalent to notice of a prior unrecorded mortgage, Foster Lumber Co. v. Harlan County Bank, 71 Kan. 158, 80 Pac. 49.

A man who innocently went through a marriage ceremony with a woman who had a husband still living and later in good faith paid off a mortgage on her property in order that they might occupy together as a homestead, acquired no interest in the property. His payments were made as a simple volunteer, and he is entitled to no lien on the property because of them, Brown v. Brown, (Miss. 1907) 43 S. 178.

Sec. 375. Assignment of mortgages.

Payment to assignor of mortgage as discharge, see *post*.

§380.

Validity. Recording. Sec. 2056 Code of 1903, as to re-

ording assignment, is amended by S. D. Laws 1907, Ch. 190.

No foreclosure of a mortgage may be made under an instrument in which the name of the assignee is omitted, *Casserly v. Morrow*, 101 Minn. 16, 111 N. W. 654. A foreclosure sale by an assignee under a void assignment operates as an assignment of the mortgage, also the attempted conveyance by the purchaser, *Cooper v. Harvey*, (S. D. 1907) 113 S. E. 717. *Wilson's Rev. & Ann. St. Okl. 1903*, sec. 921, p. 331 was construed to render invalid the assignment of a mortgage without the attestation of the secretary of the corporation, *Randall Co. v. Glendenning*, (Okl. 1907) 92 Pac. 158. Although an assignment of a mortgage note by the executrix of the decedent's estate had not been approved by the court, it was rendered valid by Code Civ. Proc. s. 475 as the substantial rights of the parties were not affected, *Wells Fargo & Co. v. McCarthy*, (Cal. 1907) 90 Pac. 203. Re-hearing denied May 29, 7.

"A mortgage may, by agreement, fix the rights of the holders by assignment of the notes secured by the mortgage to the mortgage security, and such an agreement may be implied from the circumstances of the transfer," *Preston v. Morsman*, (Neb. 1905) 106 N. W. 320. Where a mortgage has been placed in trust to secure certain notes and to guarantee their payment, and the whole amount secured had been collected, the guarantee could not obtain as a bonus interest on the mortgage assigned as collateral from the date of assignment to the foreclosure, *Ruberg v. Brown*, 71 S. C. 287, 51 S. E. 96.

The erasure of the name of the assignee in a mortgage, and the delivery of the mortgage back to the original mortgagee, does not revest the title in the mortgagee, *Carter v. Smith*, 142 Ala. 414, 38 S. 184.

Priorities. The furnishing, by a mortgagor, of money to secure the assignment of a first mortgage on his property in fraud of his creditors does not impair the security of a second mortgage or give it priority over the first, *Hatch v. Daugherty*, 145 Mich. 569, 108 N. W. 986. An attempted assignment of a mortgage and note by one who has neither in his possession and who makes no mention of the note or debt will be invalid against a prior assignment in proper form accompanied by an indorsement of the note even though unre-

corded, *Richards Trust Co. v. Rhomberg*, 19 Sp. D. 595, 104 N. W. 208; *Miller v. Berry*, 19 Sp. D. 625, 104 N. W. 311.

Rights of bona fide purchaser. A widow was induced to sign a note and mortgage on her property, which was subject to a first mortgage, under an agreement that she could have the mortgage and note returned if she were dissatisfied with the sale of a patent pump in certain counties for which the exclusive right of sale was given her. In a few days the widow found the patent was worthless, but the mortgagee refused to return the mortgage note because he had sold it for \$1,000 to an innocent purchaser who had a right under B. & C. Comp. St. §4459 to recover the full face value of \$1,500. *Lassas v. McCarthy*, 47 Or. 474, 84 Pac. 76.

Possession of mortgage. If a mortgagor had not been notified that the ownership of his mortgage was under litigation and he sold the property to the mortgagees of record in perfect good faith, the fact that the mortgagees did not produce the instrument was not notice to the mortgagor that the mortgage was held by another party, *Weinberger v. Brumberg*, 69 N. J. Eq. 669, 61 Atl. 732.

Equitable assignment. A deed by a mortgagee not in possession conveys the legal title and operates as an equitable assignment of the mortgage debt and a sale made by him thereafter under the mortgage is void, *Sadler v. Jefferson*, 143 Ala. 669, 39 S. 380. One who advances for the owner of the equity in land the amount due on a trust deed, taking an assignment of said deed and no security from the owner of the equity has an equitable title to the note and trust deed and may foreclose the deed in spite of the fact that the note, by mistake, was marked "paid," *Sprague v. Lovett*, (S. D. 1906) 106 N. W. 134. Where the defendant, a surety for the complainant upon a debt secured by a mortgage on the complainant's interest in certain land, paid the debt and surrendered the securities in evidence of it taking in return an absolute conveyance under an agreement to take possession, keep up the repairs and insurance, receive the rents in lieu of interest, and reconvey in five years if the complainant paid the debt, such facts did not amount to an absolute payment of the original debt, but an equitable assignment to the defendant, *Linkemann v. Knepper*, 226 Ill. 473, 80 N. E. 1009. The debt secured by a security deed was transferred from the grantee to A, who then had a right to collect by judgment, levy and

sale, after a reconveyance by the grantee to the grantor, or A might in equity proceed against the debtor and grantee and obtain a decree for the sale of the land as A is in equity the owner both of the land and the debt, *Clark v. Havard*, 122 Ga. 273, 50 S. E. 108.

Sec. 376. Assumption of mortgages—Liability of purchaser. A buyer who assumes a mortgage outstanding becomes the principal debtor and the original mortgagor a mere surety, but the mortgagee, unless he agrees to the substitution, may sue the mortgagor alone, or the purchaser from him. Such a promise by the grantee is not a covenant running with the land, *Scholten v. Barker*, 217 Ill. 148, 75 N. E. 460.

When land is sold "under and subject" to a mortgage and on foreclosure the seller has to pay a deficiency decree he may recover the amount so paid of the seller, *In re May's Estate* (Penn. 1907) 67 Atl. 120. A purchaser of mortgaged premises is liable to the mortgagee for the rate of interest specified in the note, though it be different from that expressed in the mortgage, *Heinricks v. Brady*, (S. D. 1906) 108 N. W. 332.

Under Rev. Civ. Code, Sec. 2451, 2452 and 2035 the purchaser of property on which there is a recorded mortgage is bound to make full inquiry as to the alleged payment of it and if he fails to do so will be postponed to the rights of the holder of the mortgage and note even though he has no assignment, *Mahnberg v. Peterson*, (S. D. 1906) 108 N. W. 339.

A purchaser from a mortgagor of mineral rights pending foreclosure proceedings takes subject to the result of the proceedings. If the purchaser at the foreclosure sale buys for himself the buyer of the mineral rights has no rights as against him, but if he buys upon a secret trust for the mortgagor the purchaser of the mineral rights acquires the rights if any sold under foreclosure, *Deskins v. Big Sandy Co.*, (Ky. 1905) 89 S. W. 695.

Sec. 377. Extension and renewal. A parol agreement extending the time of payment under a mortgage is valid, *Moodey v. Atkins*, 146 Ala. 684, 40 S. 305. The evidence was examined and held not to show no extension of the time for payment of a mortgage, *Gottschalk v. Noyes*, 225 Ill. 94, 80 N. E. 72. The assent of the wife of the mortgagor is not

necessary to an extension of the note secured by mortgage of the homestead so as to prevent the running of the statute of limitations, *Omlie v. O'Toole*, (N. D. 1907) 112 N. W. 677.

A mortgagee who had promised to either extend the time for the payment of the notes upon payment of a certain sum on account or accept a conveyance of the land from the mortgagee to be held as security for the repayment of the debt, upon learning that such a conveyance would leave the land subject to the liens of judgments against the mortgagor, was justified in refusing to carry out his agreement, *Sturgeon v. Mudd*, 190 Mo. 200, 88 S. W. 630. On a mortgage note, to secure which a husband and wife had extended a mortgage of their homestead the following indorsement was made: "Paid on the principal of the within bond \$300. Balance principal extended 5 years from Sep. 1, 1898, at 7 per cent., semi-annually, provided interest payments be made promptly when due." Held—This was merely a promise of the creditor and had no effect to discharge the homestead from the incumbrance, *McKinley-Lanning L. & T. Co. v. Johnson*, (Neb. 1905) 105 N. W. 899.

Sec. 378. Priorities—Simultaneous recording.

Priority of mortgage over mechanics' liens, see ante, §342.

Priority of mortgage over *lis pendens*, see ante §323.

The testator provided by his will that his farm should be sold to the highest bidder and that one-third of the purchase money should remain on the farm as a mortgage, the interest thereof to be paid to his wife, but this did not necessarily call for a first mortgage on the property and when the executrix waived the priority of the mortgage such waiver was valid, *Cumberland Trust Co. v. Padgett*, 70 N. J. Eq. 349, 61 Atl. 837. According to Code §1442 a lender on the security of a deed of trust made by a devisee more than two years after the grant of letters on the estate, acquired a title good even against creditors of the testator, and the fact that the lender's husband examined the records did not show he acted as her agent so as to charge her with notice of the testator's debts." *Francis v. Reeves*, 137 N. C. 269, 49 S. E. 213. A gave a deed of his land to B, which, as between the parties, was to be a mortgage, but no defeasance was executed. B, after paying the full amount of his debt to A, became bankrupt and his trustee gave a deed of the land to

plaintiff. Then A mortgaged to defendant and subsequently deeded to plaintiff. Both plaintiff and defendant knew of the prior conveyances but B's creditors did not know that the original conveyance was a mortgage. Held—Under Sec. 4730 Rev. Codes 1899 plaintiff's title was subject to the lien of the mortgage to defendant, *Valley v. First Nat'l. Bank of Grafton*, (N. D. 1906) 106 N. W. 127.

Simultaneous recording. Where two mortgages are left to be recorded at the registry of deeds at precisely the same point of time, neither one has priority over the other and a sale by the sheriff to satisfy one mortgage also discharges the other, although one is recorded a few pages in advance of the other, *Bonstein v. Schweyer*, 212 Pa. 19, 61 Atl. 447. "When two mortgages on the same land, executed by a mortgagor to two different mortgagees, and filed for record at the same time by the common agent of the mortgagees, and no instructions are given, the priority of the liens is determined presumptively by the order in which the instruments are numbered by the register of deeds," *Edmonston v. Wilbur*, 99 Minn. 495, 110 N. W. 3.

Sec. 379. Tender. A bill by a second mortgagee against the first mortgagee for an accounting upon a sale should contain an offer to pay whatever shall be ascertained to be legally due, *O. B. Crittenden & Co. v. Ragen*, 89 Miss. 185, 42 S. 281. When the amount due upon a mortgage was tendered before any steps were taken to sell, a later sale was void. Such tender, however, should include attorney's fees incurred to date when the mortgage contained a covenant to pay such fees, *Wittmeir v. Tidwell*, 143 Ala. 354, 40 S. 963. In Alabama when tender is made of the amount due upon a mortgage no redemption from foreclosure can be had unless when the bill is filed the money is paid into court and the bill so avers, *Given v. Troxel*, (Ala. 1905) 39 S. 578.

The holder of a trust deed was requested to call at a certain bank and receive payment for the loan, but he refused to appear, making no objection to the place of payment, and the owners of the trust deed were entitled to have a sale of the property enjoined, and the holder of the trust deed had no right to interest after the certificate of deposit had been made out for him at the bank, *McCue v. Bradbury*, 149 Cal. 108, 84 Pac. 993. Code Civ. Proc. §1504 was construed to

stop interest on a mortgage when the mortgagor made a tender of the amount due "and any further sum of money due" which was refused by the mortgagee holding real estate under absolute deed as security for a debt, *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93. An option to declare the whole amount of a mortgage due on default in the payment of the interest is lost if the debtor pays or offers to pay the interest before the option is in fact exercised, *Trinity County Bank v. Haas*, (Cal. 1907) 91 Pac. 385. According to the Code of Civil Procedure, s. 2074 and California Civ. Code s. 1496 a written offer to pay money is equivalent to the actual tender if it is refused, but when there is no evidence that the tender is made in good faith or that there is any ability actually to pay the money, the force of the written offer is lost and the foreclosure may be made absolute, *Doak v. Bruson*, (Cal. 1907) 91 Pac. 1001.

Sec. 380. Payment—Discharge—Merger.

As to extinguishment of mortgage by conveyance of the equity to the mortgagee, see *ante*, §150.

The owner of the equity of redemption of property subject to a mortgage will not be protected in paying the principal to one appearing on record as attorney for the mortgagee of record where such attorney has not the mortgage and note in his possession, *Bautz v. Adams*, 131 Wis. 152, 111 N. W. 69.

On the day a locator of public land gave a mortgage on the land, he entered into a partnership with the mortgagee in a live stock business. A subsequent mutual release operating on all partnership matters did not release the mortgage, *Hubbard v. Mulligan*, 34 Colo. 236, 82 Pac. 783.

A bill to set aside a recorded satisfaction of a mortgage on the ground of mistake will not lie against a purchaser under an execution sale against the mortgagor when the mortgagor is not a party and the purchaser not connected with the satisfaction agreement, the only mistake being a reliance upon the mortgagor's statement that there was no public record of a judgment affecting the property, *Barco v. Doyle*, 50 Fla. 488, 39 S. 103.

Payment to assignor. By agreement of parties a mortgagee may be paid the amount of the debt and a third party take the mortgage without any extinguishment of it, *Krugmeier v. Hackett*, (Wis. 1907) 113 N. W. 1103. When a mortgagor

obtained a loan from a corporation which sold the mortgage to a third party who had the assignment recorded and did not notify the mortgagor, he was released from liability under the mortgage by payment to the original mortgagee although the corporation failed before paying the assignee, *Pennypacker v. Latimer*, 10 Idaho 618, 625, 81 Pac. 55. A mortgage was given to A as trustee to secure the payment of a note to B and provided for reconveyance by A on full payment of the indebtedness. Payment was made to A who executed and recorded a satisfaction of the indebtedness, the mortgage and note remaining in the hands of the assignee. Held—The mortgage was discharged and the assignee estopped from claiming under the lien, *McVay v. Tonsley*, (S. D. 1905) 105 N. W. 932.

Barring of rights of mortgagee. A mortgage will not be cancelled at the suit of the mortgagor on the ground that proceedings for the foreclosure of the mortgage are barred, *Tracy v. Wheeler* (N. D. 1906) 107 N. W. 68. Under Civ. Code 1902, s. 2449, the lien of a mortgage expires 20 years after a breach of the mortgage which would entitle the mortgagee to payment of the debt, *Lyles v. Lyles*, 71 S. C. 391, 51 S. E. 113. Where payment on account of a mortgage has been made within 15 years, the debt is thereby kept alive as against both of two joint makers, *Comp. Laws 1897, Sec. 9725, Brown v. Hayes*, 146 Mich. 474, 109 N. W. 845. Where the plaintiff's trustees, after learning that their co-trustee had embezzled funds of the estate and satisfied a mortgage by receiving the amount due before its maturity, allowed the co-trustee to abscond without notifying the innocent mortgagor and later two of the cestuis que trust, being of age, released the plaintiffs from all liability on account of the embezzlement, the plaintiffs and such cestuis que trust are estopped from demanding a vacation of the satisfaction and foreclosure, *Vohmann v. Michel*, 185 N. Y. 420, 78 N. E. 156.

Statutes regulating. After 15 years' undisturbed possession, a mortgagor may apply to superior court for decree barring any action to enforce the mortgage. *Conn. Acts 1907, Ch. 107.* The form of discharge of mortgage is prescribed by *Mass. Act 1907, Ch. 294.* The cancellation of mortgages by order of court is provided for by *N. J. Laws 1906, Ch. 221.* Amending Act of *Mch. 10, 1891.* The discharge of mortgages on property located in two counties is regulated by

N. Y. Laws 1907, Ch. 621. Mortgages may be paid before maturity, N. D. Laws 1907, Ch. 175. When mortgage is satisfied mortgagee must discharge, N. D. Laws 1907, Ch. 176.

Death of mortgagee before delivery of discharge. Where a mortgagee endorsed a mortgage note as paid, with the date and his own signature, and directed a friend to return the note and mortgage to the mortgagor, a valid delivery was not made when the mortgagee died before the delivery, and the mortgage was not discharged, *Wittman v. Pickens*, 33 Colo. 484, 81 Pac. 299.

Merger. Although the holder of the mortgage acquires the fee, a merger does not take place in equity if there is another claim intervening and the intention of the party holding the fee not to have a merger is sufficient, *Anglo-Californian Bank v. Field*, 14 Cal. 644, 80 Pac. 1080. A mortgagee who took a quitclaim deed from the mortgagor of the mortgaged premises for the purpose merely of saving the time and expense of foreclosure proceedings and in return cancelled the mortgage and the notes, did not thereby work a merger of the mortgage in the fee so as to make a judgment acquired after the mortgage a prior lien on the premises. The doctrine of merger is one of intention and is never applied where it would work an injustice, *Moffet v. Farwell*, 222 Ill. 543, 78 N. E. 925. There will be no merger when the equity in an estate, on which there is a mortgage held by A as trustee, is conveyed to A in his personal capacity, *Topliff v. Richardson*, (Neb. 1906) 107 N. W. 114.

Sec. 381. Partial release.

Partial release of deed of trust, see *post* §413. A clause in a mortgage deed of forty acres which provides that for every \$600. paid upon the principal sum due one acre shall be released from the lien thereof is void for indefiniteness, *McCormick v. Parsons*, 195 Missouri 91, 92 S. W. 1162. A mortgagee foreclosed a mortgage without making the purchaser of a portion of the property a party to the foreclosure, but although the foreclosure was void as to the purchaser, this land was subject to the lien of the mortgage and he could release it by paying the proportion of the mortgage which was equitably due on his property, *Burns v. Hiatt*, 149 Cal. 617, 87 Pac. 196.

A mortgagee released part of the premises covered by

the mortgage without consulting the mortgagor and at the request of a purchaser of the portion released, who had a covenant in his deed against incumbrances inserted by the mortgagor. When the property did not bring the amount of the mortgage at a foreclosure sale of the balance the mortgagee could not hold the mortgagor on the note for the deficiency, *Meigs v. Tunncliffe*, 214 Pa. 495, 63 Atl. 1019.

Sec. 382. Penalty for failure to enter satisfaction. Alabama Code 1896, section 1066, providing a penalty for failure to enter satisfaction of a mortgage, construed, *Duke v. Chandler*, (Ala. 1905) 39 S. 567. Mississippi Ann. Code 1892, section 2451 as to suits for damages because of the failure of the holder of a satisfied mortgage to discharge it upon request, construed, *Pierce v. Kingston Lumber Co.* (Miss. 1907) 43 S. 81. An action to recover the statutory penalty for an alleged failure, upon demand in writing, to enter the payment or satisfaction upon the margin of the record of a mortgage will not lie where the mortgagor has failed to pay the fee for recording the mortgage, which by the terms of the mortgage he agreed to pay, *Smith v. Bank of Enterprise* (Ala. 1906) 42 S. 551.

Sec. 383. Foreclosure—Breach authorizing—Notes maturing at different periods. Where the terms of a mortgage to a trust association provide that the principal and interest become due if the taxes are not paid within ten days after they become due and the association may also foreclose, its right to do so is not lost although the association paid the taxes for three years, *Lawler v. French*, 104 Va. 140, 51 S. E. 180. A deed of trust securing a loan to a trust company provided that the land should be sold at not less than certain prices and that the land company should use due diligence in selling the property, but when the prices of the lots were marked at unreasonable figures by the land company so the sale of the lots were very low the trust company was not compelled to wait as required in the deed of trust to obtain the return of its loan from the sale of the land, but it could foreclose to protect its interest, *Earle v. Sunnyside Land Co.*, 150 Cal. 214, 88 Pac. 920.

A stipulation in a mortgage that "in the event of the failure of the mortgagor to pay any one of said notes at its

maturity, then all the remainder of said notes herein shall at once become due and exigible by foreclosure" is a lawful agreement, *Robson v. Beasley*, 118 La. 738, 63 S. 391. When a mortgage secured a series of notes one of which fell due annually it was held that after default had been made on the payment of several the mortgagee could proceed at once to foreclose although there was "no provision either in the notes or the mortgage, for precipitating the maturity of the whole indebtedness upon the failure to pay any part when due, *New Glasgow Planing Mills Co. v. Shaw*, (Ky. 1907) 99 S. W. 661. If a sale is made upon default of one note the mortgagee may retain enough of the proceeds to satisfy the others but he cannot make more than one sale of the property unless specially authorized to do so, *Ford v. Lewis*, 146 Ala. 190, 41 S. 144. Where a mortgage provided that it was "not to be foreclosed until the seventh or last payment is due" the mortgagee could bring a suit before that time to have already matured notes declared a lien on the land, *Arnold v. McBride*, 78 Ark. 275, 93 S. W. 989. Where the issue is the breach of a mortgage warranting a foreclosure upon the validity of which the plaintiff's title depended, upon mere proof of the existence of the mortgage without any evidence that any note was given in payment thereof or other promise besides the statement in the condition of the mortgage, or that the defendant failed to pay as required by the mortgage the burden is not on the defendant to establish the payment, *Temple v. Phelps*, 193 Mass. 297, 79 N. E. 482.

Where lands were conveyed to be held until the grantee should be able to redeem them by paying the sums paid him by the grantor with interest, the deed could not be declared a mortgage and redemption ordered because the agreement was an option to pay at some time in the future of which right there could be no foreclosure and which would never be barred by lapse of time, *Caraway v. Sly*, 222 Ill. 203, 78 N. E. 588.

Sec. 384. Foreclosure—In what jurisdiction. Kentucky Civil Code of Practice sections 62, 65 and 66 as to the county in which an action to foreclose a mortgage on land must be brought, construed, *Galloway v. Craig*, (Ky. 1906) 92 S. W. 320.

Sec. 385. Foreclosure—Pleadings—Practice—Evidence—Title of assignee. For a decision as to proper practice as to pleadings in foreclosing a mortgage in Florida see *Laffin v. Gato*, 50 Fla. 558, 39 S. 59. In a bill to foreclose the mortgage, notes made out a prima facie case of consideration, *Chambers v. Powell*, (Ala. 1905) 39 S. 919. The sureties on a bond for appeal from a confirmation of a sale of real estate are not liable for taxes assessed against the property pending the appeal, *U. S. Fidelity & Guaranty Co. v. Rieck*, (Neb. 1906) 107 N. W. 389.

Pleading. When a bill to foreclose a mortgage is brought by the original payee and mortgage against the original debtor and mortgagor, it is not necessary to specifically allege that the complainant is the owner of the note and mortgage, *Graham v. Fitts*, (Fla. 1907) 43 S. 512.

Testimony that to the best of his recollection a witness foreclosed a mortgage in the Spring of a certain year, not accompanied by any description of the steps taken to foreclose, or showing that the requirements of the mortgage as to advertisement and sale were complied with, or that a deed was given the buyer, fails to prove the foreclosure, *C. W. Zimmerman Mfg. Co. v. Pugh* (Ala. 1905) 39 S. 989. When the validity of a foreclosure is attacked and the defendant, instead of relying on the legal presumption arising from the execution of the trustee's deed that notice had been properly posted, introduced evidence which failed to show proper posting, the decision must turn on the evidence, *Smith v. Kirkland*, 89 Miss. 647, 42 S. 285.

Title of assignee. In a foreclosure suit, brought by one claiming as assignee, in which the mortgagee is a party, the assignment is sufficiently alleged by the words "the note together with said mortgage deed was assigned. . . . by an instrument in writing and delivery, for a valuable consideration," *Buckheit v. Decatur Land Co.*, 140 Ala. 216, 37 So. 75. The complainant, an assignee of a mortgage, in a suit to foreclose may introduce the answer of his assignor, a party to the suit, disclaiming all interest in the land and admitting all the allegations of this bill, as against the mortgagor. The latter, not having contradicted the complainant's evidence that he took the assignment at the mortgagor's request, is estopped to claim that the mortgage was obtained by duress, *Langley v. Andrews*, 142 Ala. 665, 38 S. 238.

Sec. 386. Foreclosure—Attorney's fee. As to master's fees in the case of a foreclosure of a mortgage, see *Gottschalk v. Noyes*, 225 Ill. 94, 90 N. E. 72. As to the rights of an Ohio sheriff to poundage upon a foreclosure sale under section 1230, Ohio Rev. St., see *Major v. International Coal Co.*, 76 Ohio 200, 81 N. E. 240.

By agreement. A provision for a 10 per cent. attorney's fee for collecting a mortgage contained therein may be enforced upon foreclosure as part of the amount due without any showing that a foreclosure was necessary, *Langley v. Andrews*, 142 Ala 665, 38 S. 238. Attorney's fee of five per cent. recovered as stipulated in the mortgage, *Robson v. Beasley*, 118 La. 738, 43 S. 391. An agreement in a mortgage to pay all attorney's fees which the mortgagee may "incur or pay" if the note is not paid when due is valid and when the mortgagee through his attorney opposes a distribution of the proceeds of the mortgaged property sold in partition such opposition constitutes a "suit" within the meaning of the clause in the mortgage which provides that the attorney's fee shall be 5 per cent. of the amount sued for, *Hayward v. Hayward*, 114 La. 476, 38 S. 424.

Sec. 387. Foreclosure—Appointment of receiver. Kentucky Civ. Code Practice Section 298 as to the right of a mortgagee to have a receiver construed, *Handman v. Volk*, (Ky. 1907) 99 S. W. 660. Kentucky Civ. Code Prac. sections 298 and 299 as to the appointment of a receiver for mortgaged land construed, *Murray v. Murray*, (Ky. 1907) 99 S. W. 301. A stipulation in a mortgage that a receiver may be appointed in case of default does not require one to be appointed and although the rents and profits are specifically mortgaged, if the property be sufficient to satisfy the lien a receiver will not be appointed, *Aetna Life Ins. Co. v. Broecker*, 166 Ind. 576 (77 N. E. 1092. A mortgagor may not be compelled to pay from the income of her homestead the expenses and fees of a receiver, appointed pending the determination of foreclosure proceedings, where the final decision is in her favor, *Joslin v. Williams*, (Neb. 1907) 112 N. W. 343.

Sec. 388. Foreclosure—Parties. Rev. Laws Ch. 187 Sec. 14, so amended as to authorize attorneys, guardians and conservators of mortgagees to foreclose by Mass. Laws 1906,

Ch. 219. Under Sec. 32 Code Civ. Proc. a trustee holding a mortgage may foreclose it without joining the beneficiary, *Taintor v. Abrams*, (Neb. 1906) 107 N. W. 225. The heirs of an intestate mortgagor were not necessary parties to a bill to foreclose a mortgage filed against the administrator prior to June 13, 1892 when the Revised Statutes of Florida went into effect, *McGregor v. Kellum*, 50 Fla. 581, 39 S. 697. After the jurisdiction of the court has attached the death of the plaintiff will not affect the regularity of foreclosure proceedings, *Wardrobe v. Leonard*, (Neb. 1907) 111 N. W. 134. A decree of foreclosure rendered against a person who acquired the title after the bill was filed and was only brought in by an interlineation in the introductory part of the bill, without any statement of his interest or any prayers as against him, was reversed, *Lafin v. Gato*, (Fla. 1906) 42 S. 387.

Holders of third mortgage bonds are not necessary parties to a suit to foreclose the prior mortgages. Their rights were sufficiently protected by making the trustee under their mortgage a party to the bill. If all such bondholders had been made parties their only right would have been to redeem the prior mortgages, *Alabama & V. Ry. Co. v. Thomas et al.* 86 Miss. 27, 38 S. 770.

Sec. 389. Foreclosure—Defences. The statutory requirement that in a suit to foreclose a mortgage there must be proof that no proceedings at law for the recovery of the debt have been had may be availed of by attaching creditors as well as by mortgagors, *Fryer v. Fryer*, (Neb. 1905) 105 N. W. 712.

Fraud. Where the mortgagee has sold land to the mortgagor and then has taken a mortgage back for part of the purchase price, falsely representing that the said tract contained 60 acres more than it actually did, and then the mortgagee brings foreclosure proceedings, the mortgagor is entitled to abatement for the shortage, *Harsey v. Busby*, 69 S. C. 261, 48 S. E. 50. The fact that a creditor of an insolvent firm conspired with the members in buying land owned by it for the purpose of conveying it to the wives of the members, in fraud of its other creditors, cannot be relied on as a defence to foreclosure by that creditor of a mortgage thereon later given

by the wives to secure the balance of the firm's indebtedness to the mortgagee, *Pitzle v. Cohn*, 217 Ill. 30, 75 N. E. 392.

Counterclaim. In an action by an assignee of a mortgage to foreclose where a claim by the mortgagor against the assignor was in excess of that due on the mortgage but was pleaded as a "defence and set off" the plaintiff is not liable for the excess, because the answer did not distinctly plead a "counterclaim," *American Guild v. Damon*, 186 N. Y. 360, 78 N. E. 1081.

Illegality in mortgage. When a wife raises money on a mortgage to compromise a criminal prosecution of her husband, the amount so paid is not recoverable at a foreclosure sale when the mortgagee knew the object for which the money was raised and actively assisted in compromising the prosecution. But debts paid at the same time for which there was no criminal prosecution, were recoverable at the foreclosure, *Pierson v. Green*, 69 S. C. 559, 48 S. E. 624. Knowledge on the part of the mortgagee that the mortgage money is to be used for an illegal purpose is no defence to foreclosure proceedings, *Hines v. Union Savings Bank & Trust Co.*, 120 Ga. 711, 48 S. E. 120.

Illegal sale by mortgagee. As Kentucky Civ. Code Prac. section 375 forbids the foreclosure of a mortgage, the only remedy being a suit to enforce the lien in a court of competent jurisdiction, if a mortgagee illegally sells the property under the terms of the mortgage and sues for an alleged balance due on the mortgage notes he can be met by a defence based on the fact of his unlawful conversion, and can only recover the excess of the notes over the amount which the court finds the property converted was actually worth. Such a defence is in the nature of a counter claim and will not be barred by limitation if the plaintiff's cause of action still exists, *Aultman & Taylor Co. v. Meade*, (Ky. 1905) 89 S. W. 137.

Payment to assignor of mortgage. A contract for the sale of land recited that the grantee agreed to assume a mortgage on the property; it was further provided that the entire price, including the amount of the mortgage, might be paid. In an action to foreclose the mortgage brought by an assignee under an assignment recorded after judgment had been made to and a release obtained from the original mortgagee it was held—that plaintiff was estopped to deny the ownership and

authority of the mortgagee to discharge the mortgage as against the grantee who relied upon the records and paid the full price, *Marling v. Milwaukee Realty Co.*, 127 Wis. 363, 106 N. W. 844.

Tardy amendment. Where a case had been on trial for five years concerning the foreclosure of a mortgage, the court was correct in refusing to admit a new plea which set up an agreement as a novation when the defendants had known of it all the time, and when it was practically an amendment made in order to bar the plaintiff's rights under the statute of limitations, *Wells Fargo & Co. v. McCarthy*, (Cal. 1907) 90 Pac. 203.

Sec. 390. Foreclosure—Usury as defence. Under Code Pub Gen Laws 1904, art. 49, §3, when usurious interest has been charged on a mortgage it cannot be recovered after the mortgage had been fully paid and discharged, *Lovett v. Calvert M. & D. Co.*, (Md. 1907) 66 Atl. 708. When a mortgage note bears interest at ten per cent. it only runs at the legal rate of seven per cent. after maturity, and if ten per cent. is collected it is usury, and under the act of 1882 (18 st. at large p. 35) the mortgagor would be entitled to an abatement of double the amount of usurious interest collected after the maturity of the note, *Earle v. Owings*, 72 S. C. 362, 51 S. E. 980. The payment of interest on overdue installments of interest, evidenced by separate coupon notes for interest on the principal, does not constitute usury. The debtor can avoid such interest on interest by paying the interest when due. A provision in the principal mortgage note that if default be made in the payment of any interest note, or any portion thereof, for 10 days after it is due, then all the principal and interest shall become due at the option of the holder refers to the amount of principal and interest due when the option is exercised, not to interest that would accrue later if no action were taken on the option. The note, therefore, is not usurious in this respect, *Graham v. Fitts*, (Fla. 1907) 43 S. 512.

Sec. 391. Foreclosure—Limitations as defence to. The time within which foreclosures may be begun is specified by Minn. Laws 1907 Ch. 197. Missouri Rev. St. 1899, section 4276 et seq. providing that no suit to foreclose a mortgage thereafter executed shall be maintained after the obligation has been

barred by the statute of limitations, construed, *Bumgardner v. Wealand*, 197 Mo. 433, 95 S. W. 211.

If the date of maturity of a mortgage is changed by agreement the statute of limitations begins to run from the new date and not from the one in the original mortgage, *Trudean v. Germann*, 101 Minn. 387, 112 N. W. 281. When a remainderman gives a mortgage on the remainder while the property is in the actual possession of a life tenant, the statute of limitations does not begin to run against the right of the mortgagee to foreclose until the death of the life tenant, *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578.

The statute of limitations on the foreclosure of mortgages is not barred by an indorsement of payment on the note, where nothing in fact was paid, or by a letter from mortgagor asking if the mortgagee would release a portion of the premises on payment of a certain sum, *Rodgers v. Robson*, 147 Mich. 656, 111 N. W. 193.

Equity will not restrain the sale of mortgaged premises under a power of sale contained in the mortgage although the statute of limitations has run against it, (3 judges dissenting), *House v. Carr*, 185 N. Y. 453, 78 N. E. 171. Sec. 5845 Rev. Codes 1899, providing for ex parte injunctions against foreclosure of mortgages when mortgagor has a valid defence, construed and held to include the defence of statute of limitations and not to be available by a purchaser at a tax sale, *Scott v. District Court*, (N. D. 1906) 107 N. D. 61.

Sec. 392. Foreclosure—Judgment. After an advertisement of a foreclosure sale it was discovered that certain lands had been unintentionally omitted from the description in the mortgage and the register attempted to include the omitted lands in the sale; suit was then brought by the purchaser to reform the mortgage and decree of foreclosure. Held—The register's power to sell was limited by the decree and after the sale it was too late to secure a reformation of the deed, *Stewart v. Wilson*, 141 Ala. 405, 37 So. 550. A conveyed a piece of real estate to B in trust for life for B's wife with remainder to B's children, and A took a mortgage for a part of the purchase money. Then A assigned the mortgage to C and took a second mortgage from B and his wife for a part of the accrued interest on the first mortgage and other charges on the real estate, but as the second mortgage could only

cover the life estate of B's wife, it could not effect the interests of the remaindermen, and a foreclosure under the powers of the mortgage was invalid against the remaindermen, although there was a provision in the second mortgage that it could be foreclosed if the interest was not paid on the mortgage assigned to C by A, *Stump v. Warfield*, (Md. 1906) 65 Atl. 346.

Sec. 393. Foreclosure—Personal and deficiency judgment. Sec. 3156 Rev. St. 1898, relative to enforcement of personal liability of mortgagor, construed, *Marling v. Maynard*, 129 Wis. 580, 109 N. W. 537. The issue of an execution for a deficiency due on a mortgage 15 years after decree is invalid, *Quinnin v. Quinnin*, 144 Mich. 232, 107 N. W. 906. Sec. 847 Code, as to nature of decree in proceeding for deficiency judgment, construed, *Parrott v. Hartsuff*, (Neb. 1906) 106 N. W. 966.

A mortgagee obtained a deed of trust from the grantee of the mortgagor securing all debts of the grantee including the mortgage. Then the property was sold under the deed of trust free from the mortgage and an order of the court approved of the release of the mortgage by the executors of the mortgagee, who first applied the proceeds to the payment of other notes than the mortgage note, but the total received was enough to discharge the mortgage. The executors were estopped from enforcing the mortgage against the purchaser and they had no right to bring an action against the mortgagor for a deficiency judgment, *Crisman v. Lanterman*, 149 Cal. 647 87 Pac. 89.

S., after mortgaging his land, conveyed it to M. with a covenant against persons claiming under him. M. then gave another mortgage on the same premises which was foreclosed and the judgment sold to W. A prior mortgage held by B. was also foreclosed, before the later one. In an action by W. against S. on his note it was *held*—that on the principle of estoppel S. could not escape personal liability by requiring payment of his mortgage to be made before that held by B, *Durbin v. Shenners*, (Wis. 1907) 113 N. W. 421.

Where a mortgagee releases part of the mortgaged premises without consultation with the mortgagor, the mortgagee cannot then hold the mortgagor on the note for a deficiency

at the foreclosure sale, *Meigs v. Tunncliffe*, 214 Pa. 495 63 Atl. 1019.

Sec. 394. Foreclosure—Marshaling securities. A person who loaned to A upon a mortgage of the latter's land and the additional security of a mortgage on the defendant's land may look first to the defendant's land for payment of his loan. The loan to A was sufficient consideration for a mortgage by the defendant to the lender covering the defendant's land, *Thackaberry v. Johnson*, 228 Ill. 149, 81 N. E. 828. Where at the time of the execution of a trust deed by husband and wife a mortgage covering part of his and all of her land was made by them and part of the proceeds used to pay a prior mortgage upon her land, and the residue turned over to the trustees to be applied upon the husband's debts, and later the trustees sued to have adjudicated their claims for advances made, and for a sale to pay them, a judgment ordering a sale of all the land and that such part of the proceeds of the mortgage which was applied upon the prior mortgage on the wife's land be charged on the land she formerly owned, and the part applied to the payment of the husband's debts, be charged upon his land, was proper. A judgment directing a sale as an entirety with a provision that the proceeds be apportioned between the different parcels according to their respective acreage, such parcels being subject to distinct equities, was erroneous in the absence of a finding that their value is in proportion to acreage, *Hogg v. Rose*, 183 N. Y. 182, 76 N. E. 38.

Sec. 395. Foreclosure—Cross actions by adverse claimants. A tax title, claimed to be adverse and paramount to the rights of both parties cannot be adjudicated in a bill to foreclose a mortgage, *Pearson v. Helvenston*, 50 Fla. 590, 39 S. 695. In a proceeding to foreclose a trust deed securing bonds of an electric lighting company persons who held unexpired contracts with it were not allowed to intervene, although the receiver had refused to carry out the contracts and fraud and collusion was charged as to the foreclosure, *Whitman v. Evanston Yaryan Co.* 217 Ill. 371, 75 N. E. 502. A released the priority of his mortgage to a building and loan company which accepted a mortgage on the property, then A foreclosed, and sold the mortgage with general covenants of warranty to

B. B made improvements on the property and A brought suit under his mortgage against B and the building and loan association as he had not been made a party to the foreclosure proceedings but in a decree by the lower court a cross bill ordering the building and loan association to pay the mortgage on account of the covenant of warranty to B was reversed as it deprived the building and loan association of the benefit of the release of the priority of A's mortgage, *Marsden v. White*, (N. Y. Err. & App 1906) 65 Atl. 181.

Sec. 396. Foreclosure—Rights of junior incumbrancer—Priorities—Prior lien.

Where a first mortgage deed of trust was void as to personalty but valid as to timber lands the holder of a second mortgage upon the same properties who foreclosed the second mortgage must account to the first mortgagee for the value of the timber lands, *Fullerton v. McBride*, (Miss. 1907) 43 S. 684. Where one deed of trust secures two notes an agreement between the purchaser of one that it shall be subordinate to the other is valid and the purchaser of the subordinate note may foreclose subject to the lien of the other note. A creditor who redeems from such a foreclosure decree and sale is charged with notice of the record and takes subject thereto, *Jackson v. Grosser*, 218 Ill. 494, 75 N. E. 1032. A junior mortgagee who is not a party to a foreclosure suit brought by a senior mortgagee may later assert his lien, but before he can subject the land to its payment he must satisfy the equity of the senior mortgagee or purchaser in possession under the judgment in the foreclosure suit. He must repay the purchaser the amount the latter paid for the property together with interest, or if the parties so desire, the land may be sold at an upset price fixed to cover the amount of the senior claim, *Karl v. Connor*, (Ky. 1906) 97 S. W. 1111. Where a junior mortgagee who was lawfully in possession was ousted by a receiver improperly appointed upon the application of a senior mortgagee, upon his removal the junior mortgagee was entitled to the rents collected by the receiver while in possession. But the latter can retain therefrom the expenses which would necessarily have been made by the mortgagee if in possession, *Rupercht v. Muhlke*, 225 Ill. 188, 80 N. E. 106. The purchaser buying a farm paid part in cash and placed a trust deed for a large part of the balance to a

third party to secure a loan from him, and gave bond which read that it was for the balance of the purchase price on this farm. When he gave a second deed of trust to the farm and it was sold to pay the first deed of trust, the second deed took precedence over the bond for the surplus after paying the first trust deed, although the bond was recorded, *Carpenter v. Duke*, 144 N. C. 291, 56 S. E. 938.

No notice to second mortgagee. The wife of a mortgagor who had made three successive mortgages, who purchased from the trustee under the last one and went into possession also holding under a deed from her husband, had a right to perfect her title by buying at the trustee's sale under the first mortgage, without giving actual notice to the claimants under the second mortgage. Her duty was done when she saw that a proper advertisement was made in a proper newspaper and a fair sale had although the second mortgagees did not see the advertisement, *Searles v. Kelley et al.*, 88 Miss. 228, 40 S. 484.

Sale of part of property satisfying first mortgage. A trustee holding a mortgage of both real and personal property forecloses on the personal and bids for it a sum sufficient to cover the entire debt. A creditor of the mortgagor at the same time has a lien subsequent to the mortgage. Held—The sale of the personal estate was as effective as if it had been for cash and the creditor should have a lien on the real estate prior to that of the trustee, *Webster v. Hasilanti Canning Co.*, (Mich. 1907) 113 N. W. 7.

Priority between assignees. Where a bond and a mortgage were assigned as collateral, but only the bond delivered, and before it was recorded the same mortgage and bond were reassigned to another, the mortgage alone being delivered, it was held that the second assignee who simply inquired of the assignor where the bond was and accepted his affidavit that he owned it, was negligent and the first assignee was therefore entitled to priority, *Syracuse Sav. Bank v. Merrick*, 182 N. Y. 387, 75 N. E. 232.

Prior judgment creditor. Where in a suit to foreclose a mortgage a prior judgment creditor was made a party and a decree later entered declaring the judgment a prior lien and ordering a sale to satisfy both the judgment and mortgage, a sale made in execution thereof gave the purchaser a title clear of the mortgage. The mortgagee corporation, having

allowed the suit which was brought in its name to be prosecuted to final decree without objection, is bound by such decree, although the attorney was not specifically employed by it, *Thompson v. Hemenway*, 218 Ill. 46, 75 N. E. 791.

Subsequent sale by mortgagee under tax lien. A bank foreclosed a mortgage on certain land, but the purchaser at the sheriff's sale had no right to prevent a subsequent sale of the land under tax certificates assigned to the bank as the foreclosure deed only conveyed the bank's interest under the mortgage, although the president of the bank had filed the bill to foreclose in his own name without making the bank a party to the foreclosure, *Bushey v. National S. B. of Camden*. (N. J. Ch. 1907) 66 Atl. 592. An investment company executed to a trustee a mortgage of the lot in controversy, conveying to him the entire title, with authority to sell and apply the proceeds to the claim secured. Two years later the company made a general assignment and the assignee and trustee, the former by authority of court, conveyed the land to plaintiff, by which transaction the company was discharged from a considerable debt. Held—After eight years creditors will not be permitted to set aside the latter conveyance, *Kirkendall v. Weatherley*, (Neb. 1906) 109 N. W. 757.

Sec. 397. Foreclosure—Statutes. Unrecorded decrees of foreclosure are made valid and permission given for their record by Conn. Acts 1907, Ch. 263, Sec. 7. Defective foreclosure by action are validated by Minn. Laws 1907, Ch. 125. The defective execution of assignments and foreclosure of mortgages are cured by Minn. Laws 1907, Ch. 86, 125 and 437. St. 1898, Sec. 3169, 3321, 3324 and 3326 relative to foreclosure of mortgages construed, *Conn. Mutual Life Ins. Co. v. Goldsmith*, 131 Wis. 116, 111 N. W. 208.

Sec. 398. Foreclosure sale—Validity—Time. Several tracts of land were bid in much higher than their value, at a foreclosure sale, in order to induce the mortgagor to allow the last tract to be sold for half its value. The bidders did not pay for the land, but leased the last tract of the purchaser, who did not know of the fraud. The sale was declared to be valid, *ex parte*, *Cooley*, 69 S. C. 143, 48 S. E. 92. •

Sale unfair. Where a grantor in a deed of trust was an ignorant and mentally afflicted if not totally incapacitated ne-

gro, and the beneficiary at the foreclosure sale prevented fair competition by misrepresentation, gave a grossly inadequate price and never took possession, the foreclosure sale was set aside, *Herring v. Sutton*, 86 Miss. 283, 38 S. 235.

Fraud on mortgagor. When a mortgagor was induced not to plead the statute of limitations or interpose a very substantial set off to a foreclosure of real estate by a promise to devise the property to the mortgagor on his death, the mortgagor had a right to equitable relief as it was fraudulent within Civ. Code, par. 1572, subd. 4. The amount due the mortgagee as determined after the set offs were allowed was decreed to be paid into Court when the judgment of foreclosure would be set aside, *Flood v. Templeton*, (Cal. 1907) 80 Pac. 78.

Delay in payment. When a sale under foreclosure appeared to have been a substantial compliance with the deed of trust, and free from fraud, the fact that the purchasers did not pay all of the purchase money for several days after the sale did not make it a sale on credit. As no one was injured by reason of the failure to pay all the purchase money at the time or upon the day of the sale, it should not be set aside upon the mere ground of inadequacy of price, *Green Real Estate Co. v. St. Louis Mut. House Co.*, 196 Mo. 358, 93 S. W. 1111.

Inadequacy of price alone is not a sufficient reason for setting aside a mortgagee's sale, *Windes v. Russell*, (Ala. 1907) 43 S. 788. Where after foreclosure sale a much larger price was offered for the property upon a resale, and this guaranteed in part by the deposit of money with the register, in connection with other evidence tending to show inadequacy of the original bids, the chancellor was justified in refusing to confirm the sale, *Montague v. International Trust Co.*, 142 Ala. 544, 38 S. 1025. Where in a suit to recover a balance due after foreclosure of a mortgage the Court found that the price paid for the land was inadequate it had no power to find the true value and force the plaintiff to take the land under his purchase at that value. When the foreclosure sale was fraudulent it should be either set aside and the parties placed in statu quo or at the election of the debtor be set aside on condition that the creditor's debt and interest be fully paid, *Hewitt v. Price*, 204 Mo. 31, 102 S. W. 647.

Time. The stipulation was made in a mortgage, that

upon default in the payment of the debt it was given to secure, the mortgagee was empowered to sell the mortgaged property at public outcry in front of the courthouse of a given county, after advertising the same. A sale under such power in order to be legal, need not be held on a public sales day, *Crawford v. Garrett*, 121 Ga. 706, 49 S. E. 677.

Sec. 399. Foreclosure sale—Appraisal. Kirby's Arkansas Digest section 5418 providing for the appraisal of property before a sale on foreclosure of a deed of trust, construed, *Merryman v. Blount*, 79 Ark. 1, 94 S. W. 714.

Sec. 400. Foreclosure sale—In parcels or in solido. The provisions of the Alabama Code which require land sold under trust deeds to be offered in subdivisions not exceeding 160 acres may be waived by the parties, *Brown v. British Am. Mortg. Co.*, 86 Miss. 388, 38 S. 312. Mississippi Constitution 1869, section 18, article 12, which provides that all lands sold under decrees of Court or execution shall be divided into tracts not in excess of 160 acres, construed in connection with Mississippi Code 1880, section 2693, being a 2-year statute of limitations as to actions to recover property sold in good faith under an order of a Chancery Court, *Shannon v. Summers*, 86 Miss. 619, 38 S. 345. A petition was dismissed for want of equity when it alleged that the petitioner was the owner of a share of land subject to a deed of trust and that the trustee thereunder had sold the land in bulk and refused the petitioner's request that he sell a less quantity and had failed to accept his offer to bid more than the amount due upon the mortgage for any 10 acres carved out of the whole tract of 44 acres, *Givens v. McCray*, 196 Mo. 306, 93 S. W. 374.

Sec. 401. Foreclosure sale—Notice of. The fact that notice covers land not mortgaged in addition to land mortgaged makes the sale voidable and not void, *Chace v. Morse*, 189 Mass. 559, 76 N. E. 142. One of the defendants in a mortgage foreclosure suit was served without inserting her christian name, but where there was only one minor daughter and she received the service, she was estopped from avoiding the service, *Gravelle v. Can. & Am. Mortg. T. Co.*, 42 Wash. 457, 85 Pac. 36.

Where a mortgage provided for four weeks' notice of -

foreclosure sale 28 days must elapse between the first day of publication and the sale, *Quinn v. McDole*, (R. I. 1907), 67 Atl. 327. When a deed stipulated that the sale should be made after advertising the time, place and terms thereof, an advertisement without giving the terms of the sale was insufficient, and as the trustee is the agent of the debtor and creditor both should have been notified so their interests could be protected, *Preston v. Johnson*, 105 Va. 238, 53 S. E. 1.

Unfair advertisement. When land situated in Tampa, Florida, was sold under foreclosure, the notice of the sale being published in a newspaper in Plant City, 20 miles away in order that the defendants and the public should not have actual notice thereof and as a result the price bid was inadequate, the sale was set aside because clearly unfair, *Macfarlane v. Macfarlane*, 50 Fla. 570, 39 S. 995.

Statutes. Notices must be filed with clerks or register of deeds before judgments by confession may be entered on lands secured by mortgages, N. J. Laws 1907, Ch. 231. Sec. 5848 Rev. Codes 1895, reducing the length of time required to elapse between the first notice and the sale controls the foreclosure of a mortgage given before the passage of the law although it was foreclosed afterward, *Orvik v. Casselman*, (N. D. 1905) 105 N. W. 1105. According to sec. 7, c. 72 Code 1899, sec. 3056, Code 1906 it is not essential that a notice of foreclosure sale be served on the assignee or alienee beside service on the grantor. The notice of sale must be posted at the front door of the court house in the county where the land lies if the deed of trust does not provide for other advertising, *Shea v. Ballard*, 61 W. Va. 255, 56 S. E. 472. Notice of foreclosure proceedings is stipulated by Wis. Laws 1907 Ch. 178.

Affidavit of notice. Mass. Rev. Laws c. 187, section 15, as amended by St. 1906, p. 182, c. 219, section 2, as to an affidavit by one selling land under a power of sale in a mortgage, construed, *Atkins v. Atkins*, 195 Mass. 124, 80 N. E. 806. An affidavit of publication of notice of foreclosure reciting publication "seven consecutive times, commencing on the 17th day of July, 1885, and ending on the 28th day of August, 1885, both inclusive," in a "weekly newspaper" is sufficient proof of publication once each week for six successive weeks under Comp. Laws 1887 Sec. 5414, *Cook v. Lockerby*, (N. D. 1907) 111 N. W. 628.

Sec. 402. Foreclosure sale—Rights of purchaser—Who may purchase—Certificate or deed. A purchaser at a foreclosure sale may foreclose the unextinguished equity of redemption accidentally omitted from the sale, for the unpaid residue of the debt secured, *McCague v. Eller*, (Neb. 1906) 110 N. W. 318.

"Possession by the mortgagor, after foreclosure, and sale under the mortgage, is not adverse to the purchaser at the foreclosure sale until actual notice of an adverse holding is brought home to the purchaser," *Tainter v. Abrams*, (Neb. 1906) 107 N. W. 225.

The purchaser of property at a void foreclosure sale and subsequent purchasers become assignees of the mortgage, and if they have no knowledge of the invalidity of the sale their possession is adverse to the mortgagor and he is barred after 10 years, *Nash v. Northwest Land Co.*, (N. D. 1906) 108 N. W. 792.

Purchase by mortgagee. When after a mortgagee's sale the purchaser told the mortgagee that he did not want the property and thereupon the mortgagee took it off his hands at his bid the mortgagee was not a purchaser at his own sale but got a good title. *Wides v. Russell*, (Ala. 1907) 43 S. 788.

Purchase by trustee. Although a title company held possession of property to collect the rents under a deed of trust subject to a mortgage, the title company had a right to buy in the property at a sale to foreclose the mortgage when its duties as trustee had been properly executed, and it had used all reasonable efforts to further the interests of the owner by helping to put off the foreclosure and the possession of the deed of trust did not make a purchase by the trustee company inure to the benefit of the purchaser, *Marquam v. Ross*, 47 Or. 374, 83 Pac. 852.

The beneficiaries of a deed of trust are not the sellers, as in the case of a mortgage to the mortgagee with power of sale, and they, therefore, have the same right to buy at a foreclosure sale thereof as any other person, *Merryman v. Blount*, 79 Ark. 94 S. W. 714.

Certificate or deed. Purchasers at foreclosure sales are to be given certificates, So. D. Laws 1907, Ch. 189, amending Sec. 645 Code of 1903. When the mortgagee at a foreclosure sale executes the deed to a purchaser in his own name instead of in the name of the mortgagor, it is void, but the pur-

chaser is entitled to be subrogated to the rights of the mortgagee to the extent of the purchase price, *Griffin v. Griffin*, 75 S. C. 249, 55 S. E. 317. A mortgagee foreclosed a property under the mortgage and obtained a certificate of sale which was not recorded, but it was valid, although more than six years had passed since the sale before the deed was executed, as making out the deed was purely a ministerial act, and the substantial title passed with the certificate of sale, *Hyde v. Heaton*, 43 Wash. 433, 86 Pac. 664.

Sec. 403. Foreclosure sale—Apportionment of taxes.

A sheriff was given two executions against A, one for delinquent taxes on real estate mortgaged to B, and the other for delinquent taxes on property mortgaged to C. At a sheriff's foreclosure sale of B's mortgage he deducted the total amount of delinquent taxes due on both pieces of property from the proceeds. The sheriff soon after sold at foreclosure the property mortgaged to C, and a rule was sought to compel the sheriff to apportion the taxes and deduct the delinquent taxes due on the property mortgaged to C from the proceeds of the sale, but it was not granted as the sheriff had paid over all money received to C so there were no funds in court, and C had not been made a party to the suit, *Patton v. Camp*, 120 Ga. 936, 48 S. E. 361.

Sec. 404. Foreclosure sale—Setting aside—Rights on.

Mortgagor may not avoid foreclosure proceedings unless he is willing to pay what is due under decree, *Stull v. Masilunka*, (Neb. 1905) 104 N. W. 188. When a judge enters a decree of confirmation of a foreclosure sale, it is final and perfects the title of the purchaser of the property upon payment of the price, and it can only be set aside on the ground of mistake, inadvertence, surprise or excusable neglect, or at any time on the ground of irregularity. Therefore a subsequent order by the judge permitting additional pleadings to be filed had no effect on the title of the purchaser, *Clement v. Ireland*, 138 N. C. 136, 50 S. E. 570.

Repayment of purchase money. The reversal of a judgment in favor of the plaintiff in a foreclosure suit after the sale has been made and confirmed and the property has been conveyed to the purchaser does not affect the purchaser's title. The purchase money paid by him or agreed to be paid

stands in lieu of the property sold. If it has been paid to the plaintiff, or has been received by him in any way, on the reversal of his judgment he is liable to the defendants therefor, subject to the offset by his debt, with interest and costs, as in other cases of mutual claims, *Harding v. Wooldridge*, (Ky. 1906) 93 S. W. 1056.

Bar by delay. After 30 years' delay, during which period the grantees under the foreclosure sale have been in possession, parties to a bill to foreclose cannot object to the validity of the sale because "it was never approved by the court," *Redmond v. Cass*, 226 Ill. 120, 80 N. E. 708. A suit by third mortgage bondholders to set aside a foreclosure sale under the earlier mortgages was held to be barred by limitations, the purchaser having taken open and notorious possession and held it for over 10 years, *Alabama & V. Ry. Co. v. Thomas et al.*, 86 Miss. 27, 38 S. 770. A notice of foreclosure which included all the land covered by the mortgage, and complied literally with the terms of the power, but was objectionable because it covered land not actually mortgaged, made the subsequent sale not void but merely voidable. The mortgagor, therefore, by a delay of eight years had lost by laches his right to have the sale set aside, *Chace v. Morse*, 189 Mass. 559, 76 N. E. 142.

The plaintiff mortgaged a tract of land to a bank, which brought an action to foreclose, fraudulently obtaining the consent of the attorney to the foreclosure judgment and his connivance to irregular proceedings at the sale of the land. The plaintiff knew of the judgment in time to have it set aside but they were entitled to bring a suit in equity to have the judgment set aside after its formal entry, and they were not barred by their laches when they brought suit within the three-year statute limitations, *Estudillo v. Security L. & T. Co.*, 149 Cal. 556, 87 Pac. 19.

Sec. 405. Mortgagee in possession—Title by prescription. The purchaser of an equity of redemption at a sheriff's sale cannot, in Alabama, maintain ejectment against a mortgagee in possession, *Carter v. Smith*, 142 Ala. 414, 38 S. 184. When a mortgagee has taken possession of land with the tacit consent of the mortgagor and he has refrained from foreclosing on the property until his right to foreclose was barred, he has the right to claim the land as his own, and if the mort-

gage and interest have not been paid within five years he acquires title by prescription. The mortgagor or his agent has no right to enter on the land during the time of such adverse claim except on payment of the mortgage and such an unlawful entry for 20 days did not defeat the ripening of the mortgagee's title by prescription, *Cory v. Santa Ynez Land & Imp. Co.* (Cal. 1907) 91 Pac. 647.

Sec. 406. Redemption—Who may redeem—Purchaser from, judgment creditor of, or wife of mortgagor.

Purchaser from mortgagor. Alabama Code 1896, section 3505, extending the right of redemption from a foreclosure sale to a purchaser from the debtor refers to a sale before foreclosure, not afterward, *Wallace v. Markstein*, 147 Ala. 262, 40 S. 201. Under Comp. St. 1903 c. 73 Sec. 16 a purchaser of the equity of redemption of a mortgage is a subsequent purchaser, *Bettle v. Tiedgen*, (Neb. 1907) 110 N. W. 548. A bona fide purchaser who has taken possession before foreclosure proceedings are begun, although not a party thereto, may redeem from a sale thereunder, *Licata v. De Corte*, 50 Fla. 563, 39 S. 58.

Judgment creditor of mortgagor. Code Civ. Prac. §701, 703, relating to the right of a mortgagee or creditor, possessing a judgment lien, to redeem the property from an execution sale, and the right of another creditor to redeem from him was construed, *Youd v. German S. & Loan Soc.*, 3 Cal. App. 706, 86 Pac. 991. A purchase by a judgment creditor at an execution sale of the debtor's statutory right to redeem from a foreclosure did not act as a satisfaction of the judgment until confirmed by the court and therefore did not deprive the purchaser of his right to redeem, *McGaugh v. Deposit Bank of Frankford*, 147 Ala. 229, 40 S. 984. The holder of two judgments who has procured the sale of land under the larger cannot redeem it from the foreclosure of a first mortgage prior in lien to the judgments because the lien of the later judgment was extinguished in the former, *Bagley v. McCarthy Bros. Co.*, 95 Minn. 286, 104 N. W. 7. Gen. St. 1894, Sec. 861, 5425 and 6044, relative to procedure necessary where judgment creditors of mortgagors desire to redeem land from foreclosure sales, construed in *Brady v. Gilman*, 96 Minn. 234, 104 N. W. 897. Where a judgment by consent provides that A "has an equity to redeem" land within a specified time

otherwise defendant "shall stand debarred absolutely" of the equity in the land, it does not prevent a right to redeem as the relation of mortgagor and mortgagee is established between the parties, *Bunn v. Braswell*, 139 N. C. 135, 51 S. E. 927. B. & C. Comp. s. 249 and section 427 were construed to make a redemption by a grantee of the mortgagor from a foreclosure sale a complete termination of all proceedings to enforce the decree of foreclosure. When a judgment creditor entered a judgment against the mortgagor during the foreclosure of a mortgage, he was entitled to recover his judgment against the land although the mortgagor's grantee had redeemed it from foreclosure, *Kaston v. Storey*, 47 Ore. 150, 80 Pac. 217.

Wife of mortgagor. Alabama Code 1896, section 3505 giving certain persons a right to redeem a mortgage does not apply to a mortgagor's wife, *Lacey v. Lacey*, (Ala. 1905) 39 S. 922. A wife who is not a party to a suit for foreclosure against land owned by her husband may after a sale therein redeem the premises during her life time, but upon the increase of the property in value after the sale but before the filing of her bill, she cannot have redemption if the purchaser at foreclosure should release her dower or pay to her its value. As to which of these latter alternatives she will accept she may elect, *MacKenna v. Fidelity Trust Co.*, 184 N. Y. 411, 77 N. E. 721.

Sec. 407. Writ of assistance. Rev. St. 1898 Sec. 3169, 3187 and 2829, providing for writs of assistance to deliver possession to purchasers at foreclosure sales, construed, *Prahl v. Rogers*, 127 Wis. 353, 106 N. W. 287. When the owner of property which has been sold at a foreclosure sale acquires a new paramount title to the property, he occupies the position of a stranger and he cannot be ousted from the property by issuing a writ of assistance, *Board of Home Missions, v. Davis*, 70 N. J. Eq. 577, 62 Atl. 447. One in possession of land sold at foreclosure, claiming to own it by conveyance made pending the foreclosure suit cannot be lawfully dispossessed under writ of assistance in favor of the purchaser at such foreclosure sale, issued without notice to him, and the court granting the application should restore him to possession, *Ray v. Trice*, 49 Fla. 375, 88 S. 367.

A sold real estate to B, B to C, and C to D, who was

a married woman, and the mortgagee from A foreclosed the premises, D's title not being recorded, but did not obtain a writ of assistance to eject C for two years, when he was estopped by laches from ejecting C's husband who claimed his curtesy interest, *New Jersey B. L. & I. Co. v. Schatzkin*, (N. J. Ch. 1906) 64 Atl. 1086.

Sec. 408. Redemption—Time—Amount—Repayments.

Amount payable. The mortgagor is entitled to redeem from foreclosure on payment of the sum paid by the holder of the mortgage plus seven per cent. where the proceedings were in violation of an agreement, supported by a valuable consideration, not to purchase the mortgage, *Unangst v. Southwick*, (Neb. 1907) 113 N. W. 989. A, the holder of a deed of trust executed by B, organized a company, and A as president of the company directed the purchase for the company of the real estate covered by the trust deed at a foreclosure sale held by A as trustee. C had purchased two lots from B before the foreclosure and had erected valuable improvements on them after paying B for the lots a sum more than sufficient to pay for the release of the land from the trust deed. Under these circumstances C was entitled to redeem the lots purchased by him on payment of the sum provided in the deed of trust, *Smith v. Downey*, (Colo. 1906), 88 Pac. 159.

Extension. Evidence examined in a suit to redeem a mortgage and held not to show an agreement extending the time for redemption, *Matney v. Williams*, (Ky. 1905) 89 S. W. 678. After the holder of a second mortgage had agreed to allow the owners to redeem the property from her, she promised to pay the first mortgage and he gave her a warranty deed when the two years for redemption after the foreclosure had passed. The owners of the equity were entitled to redeem even after the deed was given as they had been relying on her promise to let them redeem from her, *Phelps v. Root*, 78 Vt. 493, 63 Atl. 941.

Limitations and laches. Possession by the mortgagee for one year forecloses right of redemption, Me. Laws 1907, Ch. 163 Sec. 1, amending Rev. Stat. Ch. 92, Sec. 4. The mortgagor is given one year for redemption by Me. Laws 1907, Ch. 163, Sec. 2, amending Rev. Ch. 92, Sec. 7. Code Sec. 4045 and 4046, regulating the time for redemption of property from foreclosure sales, construed, *Kendig v. McCall*, 133 Ia. 180, 110

N. W. 458. Where the lower court allowed only sixty days from the date of a decree for a redemption, the Supreme Court on appeal increased it to ninety days from the date of the rendition of its decision on appeal, *Rodman v. Quick*, 217 Ill. 162, 75 N. E. 465. If a mortgagee takes possession of property and collects the rent with an agreement that it shall be applied to reduce the debt, the statute of limitations does not begin to run against the mortgagor unless the mortgagee has asserted ownership with notice to the mortgagor, *Hunter v. Coffman*, (Kan. 1906) 86 Pac. 451. The statute limiting actions to redeem from mortgage foreclosures, in a case where one claiming title under the mortgagee was previously in possession as a tenant of the mortgagor, begins to run only from the time when he comes into possession under the mortgagee, *Clark v. Hannafeldt*, (Neb. 1907) 113 N. W. 135. An action to redeem a mortgage is not barred by laches merely because begun on the last day before the expiration of the statutory period, *Cox et al v. American Freehold & Co.*, 88 Miss. 88, 40 S. 739. After a delay of 12 years the owner of the fee will not be permitted to redeem premises from a mortgage on the ground that the foreclosure was defective in being made by the mortgagee instead of the assignee, *Higges v. Daeley*, (N. D. 1906) 109 N. W. 318. Where in pursuance of a fair agreement for the surrender of his equity of redemption the mortgagor took the benefits to which he was thereby entitled, apparently abandoned his right, and was guilty of an unexplained delay during which the premises increased in value and the holder of the legal title in reliance upon the agreement entered into possession and made improvements, equity refused the mortgagor all relief, *Ferguson v. Boyd*, (Ind. 1907) 81 N. E. 71.

Payment of money improperly exacted. Alabama Gen. Acts 1900-1901 p. 164 abrogated the earlier equity rule that a mortgagor seeking to redeem an usurious mortgage must pay legal interest as well as principal so that now he need only pay the principal. The statute is constitutional because the former rule conferred upon the mortgagee no vested right, *Barclift v. Fields*, 145 Ala. 264, 41 S. 84. Where a mortgage provided that on default of interest the mortgagee could treat principal and interest as due and upon such default the mortgagee started suit to foreclose, the mortgage became due, and the mortgagor, when the mortgagor tendered the entire sum

due, could not state that he had withdrawn his foreclosure suit and only wished the interest and thereupon claim a bonus of \$1000 stated in the mortgage for a case where the mortgagor redeemed before maturity. Such a payment if made to procure the discharge of the mortgage could be recovered back by the mortgagor, *Kilpatrick v. Germania Life Ins. Co.*, 183 N. Y. 163, 75 N. E. 1124.

Recovery of profits made by mortgagee. Land was conveyed by A to B as security for various sums advanced for A's benefit. Subsequently on A's becoming insane B exchanged the land for another parcel. Held—That A's representative should recover the difference between the value of the land taken in exchange and B's original advances, *Dybdal v. Fagerberg*, (Minn. 1907) 112 N. W. 1018.

Sec. 409. Redemption—Rights on—Actions—Evidence.

One who redeems land from mortgage is charged with every fact which reasonable inquiry would have disclosed, *Miles v. Cooper*, 98 Minn. 39, 107 N. W. 744.

Rents. Persons in actual possession as mortgagees, upon a bill to redeem and for an accounting of rents and profits, are chargeable with the fair rental value of the premises, *Ketchum v. Bell*, (N. J. 1907) 67 Atl. 30. Where by the terms of a mortgage deed of trust the mortgagor waived all right to the possession of and the income from the premises pending foreclosure and in case of a sale until the equity of redemption expired, and agreed that a receiver might be appointed to take charge and collect the income and after deducting the expenses of the receivership pay such income to the person entitled to a deed under the certificates of sale the purchaser at such sale took under the decree, not the mortgage, and was not entitled to the rents and profits during the redemption period. These latter belonged to the owner of the equity of redemption, *Standish v. Musgrove*, 223 Ill. 500, 79 N. E. 161.

Contribution. A judgment creditor of a husband, who redeems from a foreclosure sale under a mortgage given by the husband and wife on lands of the wife and of the husband, to secure the husband's debt, and buys at the resale, has no right to contribute as against the heirs who take the wife's land, *Schroeder v. Bozarth*, 224 Ill. 310, 79 N. E. 583.

Possession of the certificate of redemption may have the

same evidentiary force as possession of the note and mortgage, *Franklin v. Jameson-Wohler*, (N. D. 1906) 108 N. W. 56.

Remedy. The redemption, by a second mortgagor, from the foreclosure of the first mortgage operates as an assignment of the certificates of sale and after a year he would be entitled to a sheriff's deed; if the assignment of the certificate were wrongly obtained the remedy would be by bill in equity to enforce the rights of the assignee as real owner of the land, *Franklin v. Jameson-Wohler*, (N. D. 1906, 108 N. W. 56.

Sec. 410. Redemption—Statute of limitations. An absolute deed was given to an agent to secure certain advances made by him and the agent gave a mortgage to pay off prior liens on the property, but the owner had no right to obtain his land free from the mortgage although the advances for which he gave the deed had become barred by limitations, *Churchill v. Woodworth*, 148 Cal. 669, 84 Pac. 155. See further *ante* §408.

Sec. 411. Adjustment of rents, taxes and improvements while mortgagee or purchaser is in possession. Purchasers at foreclosure sales are protected in payments for taxes, &c., during the period allowed for redemption by N. D. Laws 1907, Ch. 127. Where a mortgagee paid taxes to protect his security, he got no right of action against the owners to recover the money so paid but could only add the sum to the mortgage debt and get reimbursement in the foreclosure proceedings, *Stone v. Tilley*, (Tex. 1907), 101 S. W. 201.

If the mortgagee has erected valuable improvements on the mortgaged premises while he was in possession of them with the consent or acquiescence of the mortgagor, he is entitled to reimbursement for such expenditures including taxes when the mortgagor redeems the property, *Gillett v. Romig*, 17 Okl. 324, 87 Pac. 325.

Where a judgment for the enforcement of certain bonds and mortgages is reversed after a sale the appellant may elect to allow the sale to stand and take the purchase money or have it set aside and take the property itself, but in the latter case the appellee should be given a lien on the land for all valid taxes and other necessary charges actually paid by him in keeping it in repair or improving it and should be charged

with waste and rentals, *Hess. v. Deppen*, 31 Ky. Law., Rep. 15, 101 S. W. 362.

A executed a security deed for a loan on a lot of land, to B, then defaulted the payment of his note and was adjudged a bankrupt. A trustee in bankruptcy sold a lot of goods belonging to A that were stored in a store house standing on the lot to C who took possession of the goods and occupied the storehouse for some months. B did not prove his claim under the note in the bankruptcy court but sued in the state court and obtained judgment, sold the land under this judgment, and applied the proceeds to the payment of the debt, leaving a balance still due. B then demanded rental of C after the discharge of the trustee in bankruptcy, which was refused and A brought suit for the recovery of rent against C. The court held that C did not enter as a tenant under either A or the trustee in bankruptcy. His entry was under license to take possession of the stock of goods. He abused his license and became a trespasser ab initio. As a trespasser no action for rent could lie against him, *Stevens v. McCurdy*, 124 Ga. 456, 52 S. E. 762. Upon a foreclosure sale the buyer is not entitled to the rents and profits during the period of redemption, although there be an express provision to that effect in the trust deed, but these if collected by a receiver go to the holder of a junior incumbrance, *Schaeppi v. Bartholomae*, 217 Ill. 105, 75 N. E. 447.

Sec. 412. Trust deed to secure debts—In general. A trust deed to A to secure a debt to B with power to the trustee to foreclose and sell is probably not a mortgage; but even if it is, the beneficiary B cannot exercise the power, *Brown v. Commonow*, (N. D. 1908) 114 N. W. 728. By the provisions of Mississippi Ann. Code 1892, section 2449 the mortgagor in a trust deed is the owner against the world including the trustee and beneficiary before condition broken, *Smith v. Forbes*, 89 Miss. 141, 42 S. 382.

A grantor in a trust deed makes an agreement providing for the purchase of the property on foreclosure by a third party and its subsequent redemption by the grantor for one third advance in price. This agreement is not contrary to the usury laws when the agreement is made voluntarily after the sale by the grantor, *Yarborough v. Hughes*, 139 N. C. 199, 51 S. E. 904.

Sec. 413. Trust deed to secure debts—Substitution of trustees—Partial release—Death of grantor. An instrument substituting a trustee under a mortgage need not be under seal, *Brown v. British Am. Mortg. Co.*, 86 Miss. 388, 38 S. 312. Mississippi Laws 1896, p. 105, c. 96, providing for the appointment of substituted trustees to foreclose a mortgage, construed, *Searles v. Kelley et al.*, 88 Miss. 228, 40 S. 484. A provision in a deed of trust to secure notes that the holder shall have the power to appoint a substituted trustee does not authorize the delegation of that power to an attorney in fact. And a sale by the latter is void. The creditor secured by the deed who bought at such sale and resold to a third person is chargeable only with such sums as he actually received from the purchaser, and the latter with all proceeds received and not paid to the mortgagee minus a credit for the value of improvements he made, *Watson v. Perkins*, 88 Miss. 64, 40 S. 643.

Partial release. A deed of trust which provides that "the trustee.....shall have full power and authority, upon application.....of the Company.....to release from the lien and operation of this instrument.....any portion of the premises hereby mortgaged.....which shall no longer be requisite for use in connection therewith" and allows the mortgagor "with the consent of the trustee, to lease.....property to others" for specified purposes, gives the trustee power to release from the lien the property so leased on condition that the proceeds from the lease are applied to the reduction of the debt as provided in the deed of trust, *Fidelity Trust Co. v. National Coal Co.*, (Ky. 1905) 89 S. W. 718.

Death of grantor. The power of sale and substitution of a new trustee in a mortgage deed of trust is coupled with an interest and neither are revoked by the grantor's death, *Frank v. Colonial & U. S. Mortg. Co.*, 86 Miss. 103, 38 S. 340.

Sec. 414. Trust deed to secure debts—Sale under. When a mortgage provided that the acting trustee was authorized to appoint in writing an agent and auctioneer to make the sale for him a sale by a person not so authorized was void and innocent purchasers for value without notice are not protected, *Cox et al. v. American Freehold &c. Co.*, 88 Miss. 88, 40 S. 739. When a trust deed of both husband and wife authorized foreclosure by sale a deed executed by the trustees which

recites due compliance with the trust deed requirements was prime facie proof against both husband and wife that the requirements had been fulfilled. *Bucker v. Hyde*, (Tenn. 1907) 100 S. W. 739. Where a deed of trust was executed to a trustee to pay certain debts, specifically mentioned, providing that the balance was to be reconveyed; the court classed it with an equity of redemption and decreed that it might be sold under execution as provided by section 450 subsec 3 of the Code, *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331.

A deed of trust provided that "should said B well and truly pay said note as it falls due then this deed shall be null and void. But should he fail to do so then said A may sell," etc. A foreclosure sale because of the failure to pay the first installment of interest under this trust deed was declared to be void, as it was not directly stipulated that a failure to pay the interest promptly should mature the whole debt, *Hinton v. Jones*, 136 N. C. 53, 48 S. E. 546.

Sec. 415. Building and loan association mortgages—In general. A building association, under the laws of Tennessee, in competitive bids for loans made to members, may accept bids made in writing, *Collins v. Citizens' Bank & Trust Co.*, 121 Ga. 513, 49 S. E. 594. Under the Illinois homestead loan association act (Laws 1891, p. 89, section 8) a borrower from a loan association cannot after becoming a stockholder and obtaining a loan claim that it violated the statutes because he was the only bidder and not at the time of the bid a stockholder, *Home Bldg. & L. Ass'n v. McKay*, 217 Ill. 551, 75 N. E. 569. Although the by-laws of a building and loan association provided that payments to discharge mortgages should be made to the treasurer, yet if the president had been in the habit of transacting all the business for a long time and cancelling the mortgages, it was presumed that the association acquiesced in his assumption of authority, and his act in cancelling a mortgage bound the association although he took the money himself, *Manchester Bldg. & L. Ass'n v. Beardsley*, (N. Y. Ch. 1907) 66 Atl. 1. When a member of a building and loan association had borrowed from the company the transfer of the loan by the company to another corporation was void, and a subsequent foreclosure of the mortgage securing it carried on under the direction of the president of the original company was also void, *Cobe v. Lovan*, 193 Mo. 235, 92 S. W. 93.

Sec. 416. Building and loan association mortgages—

Accounting. A building and loan association took a note for \$2,000 at 12 per cent., advancing only \$500, and paid interest on a \$1,500 mortgage at 7 per cent., but the borrower was only compelled to pay 12 per cent. interest on the \$500 advanced, and to reimburse the association for its payments of interest on the \$1,500 mortgage as the association refused to assume the \$1,500 mortgage and the payments of the borrower ceased. All monthly payments were deducted from the whole amount of the debt when made and expenses incurred by the association in paying life insurance premiums were also credited, *Cain v. Reeve*, 30 Utah 56, 83 Pac. 568.

Sec. 417. Building and loan association mortgages—

Usury. A premium paid by the secretary of a building and loan association acting as agent for a borrowing member which is in excess of the legal rate of interest and is paid without competition is usurious, *Bechtel v. Saginaw Bldg. & Loan Ass'n*, 143 Mich. 599, 107 N. W. 695. When there were no competitive bidders for loans as the law required but the application for loans were given to an officer of the loan association, and they were considered in order of priority, any premium in excess of the legal rate of 6 per cent. was void and the association could not collect it, *Klein v. Penn. S. F. & L. Ass'n*, (Pa. 1907) 65 Atl. 1103. A loan made in Alabama by a Minnesota savings and loan association for which a premium was charged was not usurious under Gen. St. Minnesota 1894, section 2794, *Beckley v. U. S. Savings & Loan Co.*, 147 Ala. 195, 40 S. 655. In determining whether a contract is usurious payments on a stock contract should be kept distinct from the interest and premium paid on the loan, *Eastern Bldg. & L. Ass'n v. Tomkinson*, (Neb. 1906) 107 N. W. 762. Where a building and loan association makes a definite contract for a fixed sum to be paid monthly for interest, premiums and dues on the building association shares, the contract is not usurious when the premium is definite and is due for a limited number of years only, *Thompson v. Nat'l Mut. Bldg. & Loan Ass'n*, 57 W. Va. 551, 50 S. E. 756.

Sec. 418. Building and loan association mortgages—

Rights of parties upon insolvency of association. When

a building and loan association becomes bankrupt a borrowing member of the association cannot have dues paid on stock of the association credited to him, *Scaife v. Scammon Inv. & Sav. Ass'n*, 71 Kan. 402, 80 Pac. 957.

MUNICIPAL CORPORATIONS

Mechanics' liens on property of, see *ante* §333.

Control over nuisances, liability of officers for, see *post* §436.

Liability for change of grade of highways, see *ante*, §230.

Liability for defective highways, see *ante*, §§231-233.

Riparian rights and obligations of, see *post* §624.

Sec. 419. Land for waterworks and other purposes—

Area. Mass. Rev. Laws c. 49, sections 1 et seq. as to the maintenance of sewers by municipal corporations, construed, *Taylor v. Waverhill*, 19 Mass. 287, 78 N. E. 475. Sales by towns and cities of lands acquired under U. S. Rev. Stats. Sec. 2387 made valid by Ariz. Laws of 1907, Ch. 6. Leases of tide lands by counties and municipalities are confirmed by Cal. Stat. 1907, Ch. 531. Cities are authorized to buy land for city stables by N. J. Laws 1907, Ch. 219. Municipal corporations having 400 or more inhabitants are authorized to extend their corporate limits by Ala. Laws of 1907, No. 332, and those having 25,000 or more by No. 677.

Cities and towns are authorized to purchase and operate waterworks by Ala. Laws of 1907, No. 663. Foreign municipal corporations are authorized to acquire land for water supplies by Ala. Laws of 1907, No. 668. Mass. St. 1905, p. 488, c. 477, providing for the establishment of municipal waterworks in towns supplied by private corporations construed and held constitutional, *Revere Water Co. v. Winthrop*, 192 Mass. 455, 78 N. E. 497.

Location of municipal building. A city had agreed to erect a city hall and market house near the property of certain real estate owners in consideration of the payment of a certain sum of money, but the contract was void as against public policy, and after the erection of the hall the city could not be compelled to build the market house or refund the money,

Edwards v. City of Goldsboro, 141 N. C. 60, 53 S. E. 652.

Area. Burns Indiana Ann. St. 1901, sections 3658 et. seq. as to the jurisdiction of a city common council of proceedings to annex contiguous territory legally platted into town lots, and of county commissioners as to unplatted land. Ernsperger v. Mishawaka, 168 Ind. 253, 80 N. E. 543. The act entitled "An act to provide for detaching unplatted farm lands from cities and incorporated villages, and for attaching the same to adjacent townships" (Ohio Rev. St. 1905, section 1536 and ff) does not give legislative power to a court, but is constitutional. (2 judges dissenting). Incorporated Village of Fairview v. Giffie, 73 Ohio, 183, 76 N. E. 865.

NEGLIGENCE

As to defective highway, see HIGHWAY.

Sec. 420. Liability of landlord and tenant.

As to landlord's duty to repair, see further *ante* §303.

A tenant occupying rooms, with the use of a porch, as sublessee, may recover from the landlord damages due to his failure to repair the porch, which he agreed to do in the lease, Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289. When the covering of a cistern was in a dangerous condition owing to the negligence of the landlord's servant who failed to reconstruct it in a safe manner, the landlord was liable when his tenant was injured by falling down into the cistern, Upham v. Head, 74 Kan. 17, 85 Pac. 1017. Tenants in an apartment house can recover for injuries caused by a dumb waiter which was one of the common facilities furnished by the landlord where they show negligence upon his part in keeping it in proper condition, Timlan v. Dillworth, (N. J. 1907) 67 Atl. 433. The landlord of a city apartment house must use ordinary care in keeping the railings of porches in reasonably safe condition for use by the children of the occupants while at play, Widing v. Penn Mut. Life Ins. Co., 95 Minn. 279, 104 N. W. 239. In an action for the death of the child of a tenant who crawled through a hole in the side of the wall of a water closet out upon a skylight, through which it fell the landlord is liable if the water closet was for the

common use of the tenants including the father of the deceased, and if it and the skylight were allowed to be open and in a dangerous condition, and if the dangerous condition was known to the defendant, or could have been known by him by the use of ordinary care, and was not known and could not have been known by the child's mother (who rented the apartment) by the exercise of ordinary care; and the child was killed by reason thereof, *Hess v. Hinkson's Adm'r*, (Ky. 1906) 96 S.W. 436.

Where no liability. A tenant, a member of his family or his guest, cannot sue a landlord in tort for personal injuries due to his omission to repair premises which have passed into the possession and control of the tenant, even if the landlord has agreed to make repairs, *Dustin v. Curtis*, (N. H. 1907) 67 Atl. 220. When an owner's agent has agreed to fix up a tenement and put it all in proper repair, and a shed roof belonging to the basement tenement fell into decay, which the agent a few days after the tenants moved in gave permission to use for hanging clothes, providing the occupant of the basement tenement consented as it belonged to him, the owner was not liable when the roof fell into bad repair so the plaintiff was injured as the agreement to repair could not be construed as extending to the platform. *Bennett v. Sullivan*, 100 Me. 118, 60 Atl. 886.

Sec. 421. Liability of employer to employee. Where an employer failed after notice to put in safe condition a conveyor, across which an employe was trucking cement in consequence of which he received injuries from which he died, the employer is liable, *Virginia Portland cement Co. v. Luck's Adm'r*, 103 Va. 427, 49 S. E. 577. Where a fireman on a locomotive sustained personal injuries while attending to his duties in one of the freight yards of his master, it is reasonable to expect that he should have familiarized himself with his surroundings, that he might have guarded against the danger of falling into an open culvert, in case he was called to that point at night by his duties. A claim that he should have been warned by his master of the danger will not avail. *Central of Georgia Ry. Co. v. Price*, 121 Ga. 651, 49 S. E. 683.

The owner of a mine had failed to provide a platform beneath which water could drain, and this water covered a dynamite shot planted by the preceding crew of which the

plaintiff, an experienced miner, had notice, but when he made no objection regarding the absence of the platform he was not entitled to damages when he was injured by hitting the lost shot, *Wickson v. Newhouse*, 34 Colo. 228, 82 Pac. 537. Where an employe in the factory of a defendant was passing along a dimly lighted passage way through the factory building, and another employe of the defendant was rolling a hogshead on a truck, which struck the plaintiff and injured her, the employer was not liable as there was no evidence that the passageway was per se unsafe, or that it was rendered unsafe by crowding hogsheads on it on other occasions; or that the matter was brought to the master's attention, or that the master could have required knowledge of its unsafe condition through reasonable diligence, *Nelson v. Reynolds Tobacco Co.*, 144 N. C. 418, 57 S. E. 127.

Sec. 422. Owner's liability to trespasser or one injured by escaping steam. When a man enters premises without invitation expressed or implied, or to transact any business with the owner thereof, he is a trespasser, and cannot recover for injuries received through negligence, if it is not explicitly proved that the defendant or his agent knew of plaintiff's presence, *Rome Furnace Co. v. Patterson*, 120 Ga. 521, 48 S. E. 166. The owner of a blow-off pipe projecting from his factory over the shore of a lake where boys are in the habit of fishing is liable to one injured by escaping steam if he knew that persons were likely to be in a position to be injured if the steam were discharged without warning, *Ambroz v. Cedar Rapids Elec. Lt. & P. Co.*, 131 Ia. 336, 108 N. W. 540.

Sec. 423. Person invited on premises. The court will not say, as a matter of law, that brass strips, projecting from 1-16 to 3-8 on the treads of stairs in a hotel, in which a guest catches her heels and falls are defects, *Braman v. Stewart*, 145 Mich. 548, 108 N. W. 964. When a boy was injured by rolling into a somewhat concealed ditch filled with hot water, after he had walked along a well beaten path used by the public, the owner was not liable when the evidence does not show that the injury was occasioned while walking on the path itself, as there was no implied invitation by the owner to use any other part of the premises. *Etheredge v. Central of Georgia Ry. Co.*, 122 Ga. 853, 50 S. E. 1003. If a tenant

invites the plaintiff on to his premises and the plaintiff is injured by the defective flooring giving way, the landlord is liable for damages, when he knew of the defect or could have discovered it by the exercise of due care, *Ross v. Jackson*, 123 Ga. 657, 51 S. E. 578. The superintendent of a mining camp invited a boy to come up to the camp, but dynamite was left around carelessly and the boy stumbled on it and was blown up. The company was liable as it had not exercised due care in leaving the dynamite around without warning, *Hobbs v. Geo. W. Blanchard & Co.*, (N. H. 1906) 65 Atl. 382. One who, at night, attempts to walk upon a platform built for the storage of merchandise, instead of on the alley below, which is the usual passage, may not recover for injuries due to defects in the platform, *Krause v. Lewis*, 144 Mich 549, 108 N. W. 417. When the plaintiff came to a side door used ordinarily and entered the vestibule of defendant's house and knocked at one of the doors, the defendant was not liable for damages when the plaintiff in response to an invitation to come in, opened the door and was severely injured by falling down the cellar stairs. This was a case of mutual mistake as the plaintiff thought she was entering the door which the defendant invited her to enter and the defendant thought she knocked at the door to the room where he was. The law leaves the parties in such a case as this in the condition in which it finds them, *Clark v. Fehlhaber*, 106 Va. 803, 56 S. E. 817.

Sec. 424. License. A mere licensee may not recover for injuries due to falling into a ditch recently opened on defendant's land unless his conduct indicates a reckless and wanton disregard of the plaintiff's safety, *Habina v. Twin City General Electric Co.*, (Mich. 1907) 113 N. W. 586. Where an employee invited the aged plaintiff to come to a boiler box and assisted him up, afterwards leaving him there, and the plaintiff was injured on the ice negligently left on the steps, the plaintiff was a mere licensee and the company was not liable for damages, as the employee was not of such high rank that his invitation could be construed to be an invitation of the company, *Jenkins v. Central Georgia Ry. Co.*, 124 Ga. 986, 53 S. E. 379.

Sec. 425. Premises attractive to children—Turntables. It is not necessary for the owners of machinery in a factory, attractive to children, to employ a special guard to prevent

them from playing with it, *Brown v. Rockwell City Canning Co.*, 132 Ia. 631, 110 N. W. 12. A railroad on whose property a child trespassed was under no legal duty to keep a careful watch over the child, who was attracted by the machinery, and when the child was injured by a locomotive whose engineer was looking back for signals, the railroad was not responsible. *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 373. Although a revolving door is peculiarly attractive to children the owner of a building with a circular door is under no obligation to guard it so that children will not play there, and when a child is injured the doctrine of the turn table cases does not apply, and the owner is not liable, *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537. Where a child was injured by falling into a pile of hot ashes on a lot not fenced off, and far from the street where there was nothing likely to attract children and where they were not in the habit of playing, the owner of the premises was not liable for damages as the injury was caused by the plaintiff's youthful helplessness and inexperience, *Fitzmaurice v. Conn. Ry. & L. Co.*, 78 Conn. 406, 62 Atl. 620. Where a builder acting as agent for an abutting owner has left building materials piled up on the sidewalk, there is no obligation to render them a safe place for children to play, and if an iron girder falls on the foot of a child playing on the building materials the abutting owner is not liable for damages although such a place may naturally be very attractive for children to play on, *Friedman v. Snare & Triest Co.*, 71 N. J. Law 605, 61 Atl. 401.

The railroad had a turntable on its premises about 360 feet from the road and about 220 feet from the depot, and boys had been in the habit of playing on it and had been seen by the station master. The plaintiff's son was injured while playing on it and died of lockjaw, but the railroad was declared to be not liable for damages, *Walker's adm'r v. Potomac F. & P. R. Co.*, 105 Va. 226, 53 S. E. 113.

Sec. 426. Elevator shaft. For failure to furnish suitable barriers about an elevator shaft in a factory, see *Gardner v. Waterloo Cream Separator Co.* 134 Ia. 6, 111 N. W. 316. An owner is not liable for injuries due to insufficient lighting of an elevator shaft where lights were supplied but were turned off by a fellow servant, *Miller v. Centralia Pulp & Water Power Co.*, (Wis. 1907) 113 N. W. 954.

Sec. 427. Defective structures—Absolute liability. Doctrine of *Fletcher v. Rylands* as to absolute liability for defective reservoir repudiated, see *post* §628. A city is liable for damages due to the escape of water from its reservoir without proof of negligence, *Cahill v. Eastman*, 18 Minn. 324 followed, *Wiltse v. City of Red Wing*, 99 Minn. 255, 109 N. W. 114. The liability of the owner of an awning which falls and injures a traveler on the highway is to be determined not by the rule of absolute liability (*Fletcher v. Rylands*) but by the maxim "*Res ipsa loquitur*," *Waller v. Ross*, 100 Minn. 7, 110 N. W. 252.

NOTICE

As to bona fide purchasers, see *post* §§610, 611.
Records as, see *post* RECORDS AND RECORDING.

Sec. 428. By record—Knowledge—Name. Certain recorded but defective instruments are held to give notice by So. D. Laws 1907, Ch. 193.

Wild land was sold for taxes and a deed was given to the purchaser, and the deed was duly recorded. If the owner redeems the land within the statutory period but does not take a reconveyance of the title, a subsequent grantee from the holder of the tax deed without notice does not acquire a valid title, *Bennett v. Southern Pine Co.*, 123 Ga. 618, 51 S. E. 654. If a guardian enters upon a mortgage that "it is hereby released and discharged and the clerk of the court is authorized to satisfy the same of record," a subsequent mortgagee is not charged with notice, when he did not know that the release executed was a breach of the guardian's duty and without consideration, *Werber v. Cain*, 71 S. C. 346, 51 S. E. 123. Recitals in recorded deeds not in the chain of title of a judgment debtor and to which he is not a party, purporting to show equities claimed by third persons are not notice to the judgment creditor. And the purchaser at the judgment sale if he bought without actual notice takes free and clear although the judgment creditor had notice of the equities at the time, of the sale, *Mansfield v. Johnson*, 51 Fla. 239, 40 S. 196. A purchaser from one of the defendants in a suit to foreclose a

mortgage who was the principal debtor, the others being sureties, who found upon the record of the suit an assignment of the judgment to one of the surety defendants, was bound to inquire further as to the reason for such assignment, *Oglebay v. Todd*, 166 Ind. 250, 76 N. E. 238. Where a grantee in a trust deed obtains the title to 100 acres of land, the description of which by boundaries gives a less amount, the purchaser of another piece of land for value from the common grantor is not charged with notice and a part of his land necessary to make up the 100 acres will not be assigned to the holder of the recorded trust deed as that is only notice of the land included within the given boundaries, *Reid v. Rhodes*, 106 Va. 701, 56 S. E. 722.

"Actual knowledge that a stranger to the claim of title has placed a deed of the land on record is held to be sufficient to put an intending purchaser on inquiry, especially if the title which he is about to purchase appears to have been acquired for a merely nominal consideration," *Miss. River Logging Co. v. Blue Grass Land Co.*, 131 Wis. 10, 110 N. W. 796. In Missouri in a suit to compel a grantee of land to convey to a third party on the ground that the grantee knew his grantor had contracted to sell the land to the third party at the time he took his deed, the jury must decide whether or not the grantee had knowledge. A finding thereon by the jury being, however, merely advisory the Supreme Court will not pass upon admissibility of the evidence offered but will review the evidence and make its own finding, *Waddington v. Lane*, (Missouri, 1907) 100 S. W. 1139. Oral evidence is admissible to show that a grantee had at the time of the conveyance actual notice of the existence of a prior lease even although it, through a defect in acknowledgment, was not entitled to be admitted to record, *Ladnier v. Stewart*, (Miss. 1905) 38 S. 748.

Name. The purchaser's agent made due search for attachments against a piece of property owned by the "Francis Ross Estate" and he paid no attention to an attachment duly indexed and recorded against "Frank Ross," but the purchaser was negligent and the attachment was valid against the property, *Burns v. Ross*, 215 Pa. 293, 64 Atl. 526. A transcript of a judgment rendered against "Mrs. Wm. Rodgers, whose first name is unknown" filed in the office of the court of common pleas where such judgment was recorded, does not constitute a lien on the lands of Lucy Rodgers although she be in fact

"Mrs. Wm. Rodgers," Uihlien v. Gladieux, 74 Ohio St. 232, 78 N. E. 363.

Sec. 429. Notice by possession. Visible possession of real estate with acts of dominating control, improvements and the continuous cultivating of the land are as potential to imparting notice of a claim of title as the record of a deed, Shaffer v. Betie, 191 Mo. 377, 90 S. W. 131. A mortgagee is bound by notice where a grantee under an earlier unrecorded deed from the mortgagor is living on the land claiming under the deed, Martin v. Hall, (Ky. 1907) 100 S. W. 343. Open adverse possession of land is notice of every right that the possessor has therein, legal or equitable, and it is also notice of the fact that B in possession holds under a contract of sale from A, Austin v. Southern H. B. & L. Association, 122 Ga. 439, 50 S. E. 382. Although a deed to a railway of a right of way across certain lands had never been recorded, the possession of the railroad was constructive notice to a purchaser, Harman v. Southern Ry., 72 S. C. 228, 51 S. E. 689.

An agent who attempts to convey by deed places the vendee in adverse possession of which the vendor is presumed to have notice. This doctrine applies to a case where the agent of one joint tenant sold to the other tenant and the latter with his grantees were in possession for 35 years, Godsey v. Standifer, 31 Ky. Law Rep. 44, 101 S. W. 921.

A purchaser for value is not chargeable with notice of an equity of fraud merely because he is a joint tenant or tenant in common with the grantor. When the owner after a sale of mineral rights remained in possession and the purchaser only occasionally dug a test pit, the latter could not be said to be in possession so as to charge a purchaser for value from the owner of the fee with notice of his rights, Kendrick v. Golyar, 143 Ala. 597, 42 S. 110.

NUISANCES

As to dangerous premises, see NEGLIGENCE.

Damages for pollution of stream which is a nuisance, see *post* §631.

Statute of limitations as to, see *post*, §512.

Sec. 430. Obstruction of highway.

See further HIGHWAYS.

The permanent obstruction of a public street is a public nuisance against the abatement of which the statute of limitations does not run, and equity has jurisdiction to enjoin it, *Weiss v. Taylor*, 144 Ala. 440, 39 S. 519. California Civ. Code §§3479, 3480, 3493, relating to the obstruction of a street creating a public nuisance, were construed, *Brown v. Rea*, 150 Cal. 171, 88 Pac. 713. A wire stretched from a building across a highway to a tall pole, to be used for a dangerous performance, is a nuisance, *Wheeler v. City of Ft. Dodge*, 131 Ia. 566, 108 N. W. 1057.

It is a criminal nuisance to maintain an engine and pile of coal either on the highway or on land adjoining, not belonging to the accused, so that horses are frightened, *Illinois Cent. R. Co. v. Commonwealth*, (Ky. 1906) 96 S. W. 467.

When a county is in actual possession of a public highway which has been used by the traveling public for more than 15 years it can sue to recover damages for its obstruction without showing that it was acquired by the usual statutory proceedings, *Leslie County v. Southern Lumber Co.*, (Ky. 1905) 89 S. W. 242.

A fair, occupying the middle of an important business street with blowing of horns and other noise beside the obstruction of the street, is a public nuisance, and there is nothing in the city charter to give the council the right to allow such a use of the street. *City Council of Augusta v. Reynolds*, 122 Ga. 754, 50 S. E. 998.

Building. In Kentucky the authorities of a municipal corporation hold the public ways in trust for the use of the public, and cannot sell or lease them for private use. A building or other structure of a like nature, erected upon the street without the sanction of the legislature, is a nuisance, and the local corporate authorities cannot give a valid permission

thus to occupy streets without express power by charter and statute. But the owner of property across the street cannot get an injunction for its removal where he suffers no damages other than those suffered by the general public. *Labry v. Gil-mour*, (Ky. 1905) 89 S. W. 231.

Bulkhead. Under Hurd's Rev. Illinois St. 1905, c. 14, section 62, giving a city council power to establish streets and regulate the use of sidewalks and traffic thereon, the city could not grant a person the privilege of erecting a bulkhead 64 feet long, 14 feet wide, and 3 1-2 feet high on the sidewalk and it should be removed as a nuisance, *Chicago C. Stor. Warehouse Co. v. People*, 224 Ill. 287, 79 N. E. 692.

Ice. It is a criminal nuisance to allow water to flow from a tank over a street so as to form a coating of ice three feet thick on one side and six on the other, *Illinois Cent. R. Co. v. Commonwealth*, (Ky. 1906) 96 S. W. 467.

Railroad. In Louisiana a tram or railroad track constructed on a public street, or highway, by an individual, for his own use, whether with or without the authority of the police jury, may be decreed a nuisance, at the suit of a citizen and tax payer whose personal comfort and property rights are thereby affected, *Kuhl v. St. Bernard Rendering &c. Co.*, 117 La. 86, 41 S. 361.

Sec. 431. Business out of character with neighborhood—Noise—Machinery. Certain factories within 300 feet of public parks and hospitals are made nuisances by R. I. Laws 1906, Ch. 1345, amending Pub. Laws Ch. 1240. Upon the evidence it was held that the cistern, factory, saw, and planing mill of the defendant in the city of New Orleans was not a public nuisance, *New Orleans v. Lagasse*, 115 La. 1055, 38 S. 828. A tallow plant and fertilizer in the city of New Orleans were declared upon the evidence to constitute a nuisance. A use of property which materially interferes with the physical comfort of those who live in the neighborhood, or which impairs the physical enjoyment of their homes, may be a nuisance, even though it does not injure their health or result in driving them from their home. Tallow factories and fertilizing plants are prima facie nuisances, *Perrin v. Crescent City Stockyard &c. Co.*, 119 La. 83, 43 S. 938. The erection and maintenance of a ginning plant with machinery for the purpose of taking the dust and dirt out of the cotton as it passes through

the gins, destroying the comfort and affecting the health of an adjacent owner into whose residence this dust and dirt is being continually blown constitutes a nuisance, *Ponder v. Quitman Ginnery*, 122 Ga. 29, 49 S. E. 746.

Noise. Explosions from a chemical factory constituted a nuisance in *Roessler & Hasslacher C. C. v. Doyle*, 73 N. J. L., 521, 64 Atl. 156. The horn and noise of a machine and iron works constituted a nuisance in *Froelicher v. Southern Marine Works*, 118 La. 1077, 43 S. 882. Although the machinery in an addition to a manufacturing plant is correctly installed and carefully operated, yet when the vibrations it occasions are as heavy as those caused by an electric car, and keep the occupants of neighboring houses awake all night, an injunction will be issued to prevent the operation of the machinery at night, *Seligman v. Victor Talking Mach. Co.*, (N. J. Eq. 1906) 63 Atl. 1093. Under Mass Rev. Laws, c. 102, sec. 168, a person licensed to keep bowling alleys is not liable for maintaining a nuisance where the alleys are built in the usual manner and the halls make no more noise than is to be expected. The court is not authorized to restrain the use thereof from 10 p. m. to 6 a. m. where the license gives the holder the right to use the premises for the purpose stated, *Levin v. Goodwin*, 191 Mass. 341, 77 N. E. 718.

Sec. 432. Offensive odors—Sewage—Spite structures.

In an action against a town for damages due to the maintenance of a nuisance, consisting of a privy, the admissibility of various lines of testimony considered, *Town of Vernon v. Edgeworth*, (Ala. 1906) 42 S. 749. To cause a current of heated or impure air, or air charged with offensive smells to strike upon the opposite window of the plaintiffs is a nuisance if the plaintiffs elect, as they have a right to elect, to keep the window open, *Vaughan v. Bridgham*, 193 Mass. 392, 79 N. E. 739. The hum and noise of a machine and iron works and the odor of steam rising therefrom in a city was so great as to constitute a nuisance and for damages caused thereby to the plaintiff's land, he may recover, *Froelicher v. Southern Marine Works*, 118 La. 1077, 43 S. 882. If the loud explosions and bright lights from a chemical factory awake the plaintiff at night and the bad odors of the chemicals annoy him, he is entitled to damages as the value of his property is decreased by the nuisance

maintained by the defendant, *Roessler & Hasslach* C. C. v. Doyle, 73 N. J. L. 521, 64 Atl. 156.

A "crematory" in which ordinary garbage was burned and the ashes made into fertilizer made the odor so offensive within 2500 feet thereof as to constitute a public nuisance and the Chancellor decreed that its owners be enjoined from further continuing its works in such manner as to injure the complainants who were residents of the neighborhood. The works were not ordered stopped entirely, *Laird v. Atlantic Coast Sanitary Co.*, (N. J. Eq. Ch. 1907) 67 Atl. 387.

Gas. When a gas company allows the gas from its works to escape so as to poison the water supply of the plaintiff and fill the soil with poisonous substances so the land was rendered unfit for cultivation, the plaintiff is entitled to damages unless his right of action is barred by limitations, *Donohue v. Stockton G. & E. Co.*, (Col. 1907) 92 Pac. 197.

Fences erected to annoy adjoining owners are made nuisances and abatement provided for by Minn. Laws 1907, Ch. 387.

Acids. When the defendant corporation has allowed its agents to empty acids on the plaintiff's land for a long time, so that the plaintiff's cattle were poisoned and the land rendered unfit for pasture, the plaintiff has a cause of action and is entitled to have a determination by a jury of the amount of the damages, *Stokes v. Pennsylvania R. Co.*, 214 Pa. 415, 63 Atl. 1028.

Sewage. A city is liable for the discharge of sewage into a stream to the damage of a lower riparian proprietor irrespective of negligence in the construction and operation of its system, *Vogt v. City of Grinnell*, 133 Ia. 363, 110 N. W. 603. Where a city has polluted a stream by discharging sewage in it so it has become an open part of the city sewerage system, a landowner may recover damages estimated at the depreciation in the market value of his property since the construction of the sewer, *Carpenter v. City of Lancaster*, 212 Pa. 581, 61 Atl. 1113. Where a drain built by abutters by permission of the city empties into a natural stream and later without the city's express permission is used as a sewer to the injury of a lower riparian owner the drain is a nuisance and the city is liable for damages for its failure to abate it. But the city is not liable for damages due to its omission to exercise its governmental power by the adoption of resolutions or ordinances

or from the failure of its officers to enforce them when in existence. When different persons discharge sewage and filth into a stream they are not jointly liable for damages in the absence of common design or concert of action, but each is liable only for his proportion, *Mansfield v. Brister*, 76 Ohio, 631, 81 N. E. 631.

Sec. 433. Smoke. In Indiana a city ordinance declaring the emission of dense smoke within the city limits a public nuisance, is valid although it excepts private residences, *Bowers v. Indianapolis*, (Ind. 1907) 81 N. E. 1097. If a railroad uses a side track on which to store locomotives, when not in use, so the smoke, noise and cinders damage the property of an abutting owner, the railway is not liable for damages, *Thomason v. Seaboard Air Line Ry.*, 142 N. C. 318, 55 S. E. 205. Mississippi Constitution section 17 gives a landowner a right to be fully compensated for any loss of value sustained from any physical injury to his property or disturbance of any right in relation to it, whereby its market value is diminished, although no condemnation is had. People who live in cities are entitled to enjoy their homes free from damaging results from invasion of smoke, soot, cinders, etc., sufficient to depreciate their value as property, in addition to rendering their occupancy uncomfortable, *King v. Vicksburg Ry. & Light Co.*, 88 Miss. 456, 42 S. 204. The use of soft coal in a factory located in a country district suitable for country homes as a result of which dense black smoke in great quantities envelopes and discolors a dwelling house, causing discomfort and financial loss to the occupants, constitutes a nuisance, where soft coal is not necessary to operate the factory and its use is not in fact reasonable. The occupant is entitled to an injunction which will be modified if a change of conditions make it proper to use soft coal. The case contains a valuable discussion of the authorities, *McCarty v. Natural Carbonic Gas Co.*, 189 N. Y. 40, 81 N. E. 549.

Section 434. Injunctions against—Odors carried across State line—Authority given public service corporations. One who lives next to a house of prostitution is entitled to an injunction to restrain the further continuance of the nuisance, *Tedescki v. Berger*, (Ala. 1907) 43 S. 960. Equity will restrain the location of a cemetery in a place where it will pol-

lute the water of wells and streams used for drinking purposes, *Payne v. Town of Wayland*, 131 Ia. 659, 109 N. W. 203. Injunction will issue at the suit of an adjoining owner to prevent the erection of a wooden building, in violation of a municipal ordinance, so near as to cause increased danger from fire, *Bangs v. Divorak*, (Neb. 1906) 106 N. W. 780.

When the defendants erect a coal tippie and a trestle near the plaintiff's coal tippie, the plaintiffs are not entitled to an injunction unless they prove that the defendants' coal tippie will injure their mining operations; but when the defendants leave open a right of way to an old mine, which was the only interest in the land the plaintiffs had, and did not otherwise materially interfere with the operation of the plaintiffs' coal tippie, contrary to their complaint, no injunction will be granted, *Llewellyn v. Cauffiel*, 215 Pa. 23, 64 Atl. 388.

When an automobile garage is established in a frame building adjacent to other frame buildings, an injunction may be issued against the storage of gasoline in the tanks of the automobiles and against filling the tanks with gasoline inside the building. For a full discussion see *O'Hara v. Nelson*, (N. J. Eq. 1906) 63 Atl. 836.

A railroad obtained a license under an ordinance of the council to use a public street on condition that the company should not use bituminous coal or blow the whistles on the locomotives while in the street, but when these conditions were violated a property owner had a right to have an injunction issued against the company to restrain it from violating these conditions by blowing the whistles and using bituminous coal under act of June 19, 1871 (P. L. 1360) *Edwards v. Pittsburg Junc. R. Co.*, 215 Pa. 597, 64 Atl. 798.

Laches. If a builder of an automobile garage commences to build in the middle of October and a suit is not filed against its construction as a public nuisance until November 5th, the suit is not barred on account of the delay, *O'Hara v. Nelson*, (N. J. Eq. 1906) 63 Atl. 837.

Odors carried across state line. A foreign corporation will be enjoined by the Supreme Court, at the suit of a state, from discharging sulphurous fumes from across the state line so as to cause and threaten damage on a large scale to the forests and vegetable life in the plaintiff state, *Georgia v. Tenn. Copper Co.*, 206 U. S. 230.

Effect of authority given public service companies. Not-

withstanding the authority conferred by a legislature upon a railway and light company to construct and operate plants for the generation of electricity, the company acquires no permission for the commission of a nuisance through escape of electricity and the vibration of machinery, and it is liable for such injury, *Townsend v. Norfolk Ry. & Light Co.*, 105 Va. 22, 52 S. E. 970.

Sec. 435. Damages. Montana Civ. Code §4330 was construed to enable a party who abates a private nuisance maintained by a municipality to recover the expense of abating the nuisance after he has given notice, *Murray v. Butte*, (Mont. 1907) 88 Pac. 789. Where in a suit to restrain the continuance of a nuisance it has been abated at the time of trial and there is no probability of its renewal in the future the court may retain jurisdiction to award damages. The plaintiff after the erection of the plant which constituted the nuisance, having leased his land, renewed the lease and finally leased again to the same tenant at a reduced rent, it was held that in the absence of any permanent injury to the reversion, or evidence that the reduced rent was due to the nuisance, no recovery of damages could be had, 3 Judges dissenting, *Miller v. Edison Electric Illuminating Co.*, 184 N. Y. 17, 76 N. E. 734.

The fact that a railroad water tank was reasonably necessary is no defence to an action for damages caused thereby to a neighboring dwelling, *Texas & Pac. Ry. Co. v. Edrington*, (Texas 1907) 101 S. W. 441.

Sec. 436. Municipal control—Personal liability of officers.

Authority of municipal officers to create obstructions in highways, see *ante*, §221. Cities (of 5,000-25,000) are given power to prevent nuisances by Neb. Laws 1907, Ch. 13, Sec. 8384. Amending C. S. Ch. 13 Art. 3. Ch. 661 Art. 2, Laws 1893, the Public Health Law, is so amended as to give to local boards of health control over breeding places of mosquitoes by N. Y. Laws 1906, Ch. 583. Equity will restrain a town from enforcing an ordinance declaring all buildings used for the storage of cotton seed a nuisance and ordering them removed by a certain date, if not then by the town at the owner's expense. Its enforcement would cause ir-

reparable damage. The ordinance is void, *Town of Cuba v. Mississippi Cotton Oil Co.*, (Ala. 1907) 43 S. 706.

Personal liability of officers. Where a smallpox hospital was located on land adjoining that of the plaintiff and his driveway and other portions of his land appropriated to the use of the hospital to the exclusion of the plaintiff and his tenants, the defendants, members of a city board of health, not having taken the action required by Mass. Rev. Laws, c. 75, sec. 46, are liable for damages if the acts were done by them, or under their direction by persons in their presence. They would not be liable for negligence in locating the hospital or because it constituted a nuisance unless acts of misfeasance on their part be proven, *Barry v. Smith*, 191 Mass. 78, (77 N. E. 1099).

OIL AND GAS

Taxation of oil and gas rights, see *post* §543.

Sec. 437. Conveyances of. A deed conveying the fee of land, accompanied by a writing, executed by the grantee, purporting to convey to the grantor all the oil and gas in the land amounts to a deed of the land with an exception of the oil and gas, *Kurt v. Lanyon*, 72 Kan. 60, 82 Pac. 459. Where an owner of gas and oil lands conveys his rights to the gas and oil to several parties, selling to each a small interest for a term of years, a covenant of warranty is implied of a good title and peaceable possession and this implied covenant extends not only to the right to search for the oil but also to the right to the oil when produced to as large an amount as was stipulated in the lease, *Kilcoyne v. Southern Oil Co.*, 61 W. Va. 538, 56 S. E. 888. A lease of oil lands conveyed "one half the oil and gas that may hereafter be produced. . . . except the well that is now producing oil on said land." The lessees deepened the said well when it had ceased to produce oil to a lower sand rock. Held—That the deed excepted the oil produced even from the lower sand rock, *Ammons v. Toothman*, 59 W. Va. 165, 53 S. E. 13. If A made a lease to B for the production of oil, reserving to himself one eighth royalty, and then if A sold the land to C with one-sixteenth interest in the oil and C

allowed the property to be sold for taxes and a tax deed was conveyed to D; then B's lease and interest in the oil below the surface as well as A's and C's one sixteenth royalty each, were all conveyed by the tax deed, as the oil is only taxable to the owner of the surface under Code 1899, sec. 25, c. 31, and D bought the oil and the land, *Peterson v. Hall*, 57 W. Va. 535, 50 S. E. 603. A deed conveying land reserved the oil and gas rights, and entitled A to seven eighths interest in them leaving one eighth to the grantee B. A partition of the oil and gas could not be made by lines on the surface, but only by a sale of all the gas and oil, although B did not want to develop the property or sell the oil and gas rights. Such a deed reserving to A seven eighths of the oil and gas with "full right and privilegeto operate and develop the same" leaves the title to the oil and gas to the extent of seven eighths vested in A as a separate property from the surface of the land. *Preston v. White*, 57 W. Va. 278, 50 S. E. 236.

When agreements have been procured in regard to rights in oil lands by a Syrian who had obtained the extreme confidence of his countrymen, who were new to the country and trusted to his probity, and the agreements were very much to the disadvantage of the plaintiffs and obtained by undue influence, they were void, *Ballouz v. Higgins*, 61 W. Va. 68, 56 S. E. 184.

The plaintiff owned a lot in Los Angeles, which the defendant's grantor represented he wanted to hire to erect a tenement house on, and the lease was made for \$100 per year. When the plaintiff found out that the defendant was using the property to extract oil, he had a right to cancel the lease as the severance and removal of oil from the real estate was waste, and she was also entitled to damages for the value of the oil extracted as the lease only granted the right to use the surface of the land and did not convey a right to the minerals or oil, *Isom v. Rex C. Oil Co.*, 147 Cal. 659, 82 Pac. 317.

Sec. 438. Right to drill wells—Contract to drill. when an adjoining land owner drills well on his own farm he may draw the oil and gas from beneath an adjoining farm, and the other owner has no remedy except to drill wells himself, as it is well known that gas and oil are not stable, but may remove from one property to another, *Barnard v. Monongahela Nat. Gas Co.*, (Pa. 1907) 65 Atl. 801. Where the lessors

agreed with the lessees of oil lands to insert a provision in any deeds to other land owned by the lessors which should prohibit drilling oil wells on the land, the lessors could give the right by lease and the original lessees had no right of action, *Test Oil Co. v. La Tourette* (Okl. 1907) 91 Pac. 1025.

Where a contract for digging an oil well provided that it be sunk 500 feet if necessary at a certain price per foot and the diggers after digging over three hundred feet were obliged to stop because the casing became crimped, and were then prevented from drilling another well by the other party to the agreement, they could not recover the contract price for the uncompleted well although they might have recovered for breach of contract in wrongfully preventing them from digging another well, *Fuller v. Kaminsky*, (Tex. Civil Appeals 1906) 95 S. W. 655. If a contract to drill a gas and oil well provides that the well shall be drilled in a good workmanlike manner that does not necessitate completing the well by installing packing and tubing in it, or the removal of salt water, and the contractor has a right to extra pay for such work when done in pursuance of an oral contract with the owner's representative, *Collier v. Munger*, 75 Kan. 550, 89 Pac. 1011.

Where the defendant agreed to drill an oil well 2,000 feet unless oil or gas were found sooner, and quit at 1,500 feet after being paid for that depth, the measure of the plaintiff's damages is the cost of cleaning and casing the well and the excess cost of drilling it to 2,000 feet over what he had agreed to pay the defendant therefor, or if the well has been absolutely destroyed the amount paid the defendant, *Corbin Oil & Gas Co. v. Mull*, (Ky. 1906) 97 S. W. 385.

A contract "for the purpose of boring one well" which contained a clause providing a payment of "\$2.25 per foot for each and every well when completed" does not constitute an agreement to sink more than one well. Where the defendant owned the land on which the plaintiff dug the well, the fact that the former later used the well did not amount to an acceptance so as to make him liable for the contract price, *Hahl v. Deutsch*, (Texas Civil Appeals 1906) 94 S. W. 443.

Where a contract between an oil well digger and an oil company for the drilling of a 1,500 foot well to be paid for in cash and stock contained the following clause—"In event that (the well digger) expends the cash received from this company and the proceeds of his stock in drilling said well, and the

required depth of 1,500 feet has not been reached, (the well digger) shall not be obligated to expend any more money, and it shall be optional with the company whether they shall continue the drilling of said well to the required depth, or shall abandon same. If the well is taken over by the company, and the drilling continued, (the well digger) hereby agrees that the said company shall not be required to pay any more than actual cost for drilling operations, and shall have free use of the drilling outfit and derrick belonging to the said (well digger)." It was held that the oil company had no right to seize the machinery for the purpose of boring the well deeper, *Hammond v. Decker*, (Tex. Civil Appeals 1907) 102 S. W. 453.

Sec. 439. Oil and gas leases—Validity—Assignment—Oral agreement—Liability to co-tenant of lessor.

Champertous agreement. Where the owners of land subject to an oil and gas lease made a contract with a third party whereby they were at such third party's expense to bring a suit in their own name to set aside the lease and if successful to execute a new oil and gas lease to such third party, the contract was void for champerty, *Mud Valley Oil & Gas Co. v. Hitchcock*, (Ind. 1907) 81 N. E. 111.

Validity. A contract in the form of a lease for 10 years of mineral rights in a 40 acre tract of land in an improved part of the country, by the terms of which the lessee agrees to begin operation within six months or pay \$50 quarterly, in advance, for each additional three months delay, until an oil well is dug, and whereby, if oil or gas be discovered, the gross yield is to be shared by the parties in certain proportions, constitutes a valid agreement, *Houssiere Latreilbe Oil Co. v. Jennings-Heywood Oil Syndicate*, 115 La. 107, 38 S. 932.

Agreement to assign. After the assignment of gas rights in oil or gas leases to a gas company, the assignor retaining the oil rights and contracting with the assignee to transfer all oil wells developing gas, and the gas company contracting to transfer all gas wells developing oil, upon certain conditions and within a certain limited time, upon the discovery of gas in paying quantity, and the compliance with the conditions of the contract, the assignor must deliver the possession of the well, and cannot claim an intention to sink to a lower level

for oil as a ground for refusal, *Carnegie Natural Gas Co. v. South Penn. Oil Co.*, 56 W. Va. 402, 49 S. E. 548.

An oral agreement, to which the lessor's wife is not a party, changing the rental of an oil and gas lease from cash to a royalty basis, is valid, *Wilson v. People's Gas Co.*, 75 Kan. 499, 89 Pac. 897.

The parties to an oil lease which provides that the lessees shall pay, as royalty to the lessor, one-sixth of all the oil produced, may orally make a subsequent agreement changing the rate of the royalty, and such agreement is not void within the statute of frauds, *Wanamaker v. Amos*, 73 Ohio St. 163, 76 N. E. 949.

The lessor made a verbal contract with a lessee of gas and oil premises that he should surrender his lease if another lessee brought an action under the provisions of his prior lease to recover the premises, and when it was shown that the lessor would not have executed the lease without the parol contract, the lessee had no right to damages for ejectment, *Phillips Gas & Oil Co. v. Pittsburg P. G. Co.*, 213 Pa. 183, 62 Atl. 830.

Liability to co-tenant of lessor. Where one co-tenant gives an oil lease covering the whole of the common property, and under which the lessee produces oil, paying royalty to the lessor, the lessor and lessee must jointly make reparation to the injured co-tenant, *McNeelly v. South Penn Oil Co.*, 58 W. Va. 438, 52 S. E. 480.

Sec. 440. Oil and gas leases—Forfeitures on lessee's failure to develop property—Penalty for such failure—Waiver—Improvements.

Forfeiture on lessee's failure to develop property. Owner of oil or natural gas lands may compel lessee, who has forfeited his lease, to release his interest on county records, Ill. Laws 1907 P. 400.

In an action to quiet title to land subject to a gas and oil lease which provides that eight wells be dug and "on failure to drill any of these wells—the second party shall surrender the right to drill on all of this grant excepting 10 acres for each well drilled," under which only one well was dug, the owner of the land cannot recover the entire tract or all of it except a specific 10 acres in a square surrounding the well actually dug, *Jones v. Mount*, 166 Ind. 570, (77 N. E. 1089).

Under an oil and gas lease for five years or as long as gas and oil could be found on the land, a proviso that in case no well was completed within 60 days, the grant should be null and void unless the lessee should thereafter pay at the rate of \$40 for each year after such commencement was delayed, the owner at the end of 60 days could declare a forfeiture where no well has been completed and the lessee had not paid the sum stipulated for delay, *Dill v. Frazee*, (Ind. 1907), 79 N. E. 971.

Where an oil and gas lease provided that in consideration of \$1 the owner granted all the oil and gas in and under the land described with the right to drill therefor, reserving to the grantor one-sixth of all oil saved for the term of five years from date, and, if gas only is found, then the lessee shall pay \$50 per year and furnish gas to the grantor free, and that, in case no well was completed in — years, the lease should be void unless the grantee should pay 50 cents per acre semi-annually in advance for each year the completion of the work was delayed, and the lease ran for only one year unless acreage rental was paid semi-annually in advance, the grantee was only entitled to a reasonable time within which to begin operations, *Erie Crawford Oil Co. v. Weeks*, (Ind. 1907) 81 N. E. 518.

A lease will not be set aside for failure of the lessees to put in operation a drill according to their promise made prior to the making of the lease where the lease provides another and longer time for the fulfillment of the promise, *Ruggles v. Spindle Bottom Oil and Gas Co.*, 72 Kan. 662, 83 Pac. 399.

The lessee, holding a lease of gas and oil land for two years, sunk a well on the property and found gas in paying quantities, but he preferred to use the wells on adjoining land and he paid no royalty to the lessor, abandoning the well for two years. Although the lease provided for an indefinite extension if oil or gas were found in paying quantities, as the lessee had not used reasonable diligence in developing the land as required by the terms of the lease, the lessor was entitled to have the lease rescinded and a decree segregating the lessor's other land from the land occupied by the well and canceling the lease thereto was valid, *Buffalo V. O. & G. Co. v. Jones*, 75 Kan. 18, 88 Pac. 537.

A lease provided that the lessor could "forfeit the lease if no royalty were paid within six months from the drilling

of a well or if no other drilling was done within that time." The lessees drilled a well and did not shoot it and the testimony was conflicting whether there would have been any oil produced if the well had been shot or not; but they were not entitled to claim that the well had not been completed and that they were not compelled for that reason to drill other wells as provided in the lease or submit to a forfeiture; all provisions of a lease will be very strictly construed against the lessee when, as in this case, wells on adjoining land are draining the oil from the lessor's land, *Federal Betterment Co. v. Blaes*, 75 Kan. 69, 88 Pac. 555.

When father and son on the same day executed gas and oil leases of their adjoining farms to the same lessee containing the usual clauses providing for the payment of royalties and that they become void upon failure to either develop or pay rental, and the lessee sunk a well on the son's land but did no work on that of the father; the latter, upon the termination of a reasonable time, was entitled to have the lease cancelled, *Kimball Oil Co. v. Keeton*, (Ky. 1907) 101 S. W. 887.

Where an oil lease provides that the lessee shall begin drilling within one year or pay \$25 annual rental until work was begun and the lessees held the land for five years without beginning operations, proper demand having been made upon them to do so, the lease could be canceled, *Flanagan v. Marsh*, (Ky. 1907) 105 S. W. 424.

A father and son on the same day executed gas leases of their respective lots to the same tenant and both leases were for 20 years or so long as gas could be obtained in paying quantities, and provided that a failure to begin operations should work a forfeiture. The son's lease provided that work should be begun thereon after completing a well on the father's land. When the tenant did no work whatever on the father's property but sunk a well on that of the son, the father upon the termination of a reasonable time was entitled to have the lease cancelled, *Kimball Oil Co. v. Keeton*, 31 Ky. Law Rep. 146, 101 S. W. 887.

It was held that the following written contract: "In consideration of . . . first party has granted and do hereby grant to second party, the exclusive right for the sole and only purposes of operating for coal, oil, gas, ores and other minerals, that certain tract of land (describing it)—terms of lease twenty years or so long as oil, gas, or any of the above substances are

obtained in paying qualities. The party of the second part further covenants that will give the party of the first part the full equal pro rata share of one-tenth of all the oil and minerals produced and saved on the above described property, the said one-tenth to be set aside in the pipe line when one is constructed, and should gas be found in paying quantities to justify party of second part marketing the same, the consideration in full to the party of the first part, instead of the one-tenth royalty, shall be five dollars per month for the gas from each well so long as it shall be sold therefrom, second party to commence a well on the premises within one year from the date hereof, or pay thereafter a rental of sixteen dollars payable annually"—could be cancelled by notice by the lessor to the lessee that he will no longer accept the annual rental and permit his land to remain idle and undeveloped, and unless within one year from such notice the lessee in good faith commences a well, the lessor may have the lease forfeited, *Monarch Oil, Gas & Coal Co. v. Richardson*, (Ky. 1907) 99 S. W. 668.

Where a company which was engaged solely in sinking wells on its own property had in operation two "gushers" and thereupon executed a contract to supply oil which provided that it should be voidable upon the "failure of oil wells," this latter phrase referred to the two wells in actual operation. Upon a substantial failure by them to produce oil naturally the contract was avoided, *San Jacinto Oil Co. v. Ft. Worth Light & Power Co.*, (Tex. Civil Appeals 1906) 93 S. W. 173.

In an original lease of land for oil and gas purposes, it was provided that it should remain in force for a term of five years from date, and as much longer as the rent for failure to commence operations was paid, and as long after the commencement of operations as the premises were operated for the production of oil and gas; and further that the lease should become null and void and all rights thereunder cease unless a well should be completed on the premises within three months from the date thereof, or unless the lessee should pay a stipulated sum quarterly in advance. Three months before the expiration of the lease a location was made for a well but nothing further was done at that time toward development; two days later an agreement was entered into between the parties and indorsed upon the back of the lease, viz: extending the lease beyond the date of its expiration in the original lease under the following

provisions; that a well should be commenced within 10 days from date thereof, and the same should be prosecuted with due diligence until completed, but on account of unavoidable accident if the well was not completed within the life of the original lease the lessor agreed to accept a rental of \$100 per month until such well was completed. In view of the uncertainty of meanings and ambiguity of the lease, it becomes necessary to construe the lease in connection with the agreement subsequently made and indorsed thereon; it is then found that the parties have themselves construed the lease to expire at the end of five years, unless oil or gas be produced within that time. No well was begun within the 10 days expressly agreed upon, but after the lessor had rented the property to others the lessees, under protest began operations which they now claim served to extend the lease. The provisions of the new agreement quoted is inconsistent with the provisions of the original lease quoted and as the parties clearly intended to change the lease in this respect, having done so, and not having complied with the terms thereof, the lease expired at the end of five years, *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S. E. 137.

No royalty from unproductive well. If a gas and oil lease provides that "this lease shall become null and void—unless a well shall be completed on the said premises within three months—or unless the lessee shall pay" a certain sum quarterly, the lessee is not liable for payments after the completion of an unproductive well while drilling another, especially when no demand for such payments was made at the time, *Smith v. South Penn Oil Co.*, 59 W. Va. 204, 53 S. E. 152.

Penalty. Where a lease of oil lands provides that "in case no well is completed with sixty days from this date, then this grant shall be null and void, unless second party shall pay to . . . first party one dollar per day in advance for each day thereafter such completion is delayed and it is further agreed that the party of the second part shall drill a well at the rate of one well every sixty days after date until five wells are completed. In case any well is not completed in said sixty days, as above provided for, parties of second part shall pay one dollar per day in advance until said well is completed:" the first provision applied only to the first well, and under the last provision the lessee was liable for \$1 per day on each well

not drilled within their respective 60-day periods from the date of the contract, *Dailey v. Heller*, (Ind. 1907) 81 N. E. 219.

Waiver by acceptance of rent. Under an oil and gas lease which provides that the lessee "agrees to drill a well upon said premises within two months from this date, or thereafter pay, in advance, the first party for further delay a quarterly rental of \$20 until said well is drilled," where the land owner accepted five quarterly payments without protest he cannot within 10 days after the last payment sue to declare a forfeiture, *New American Oil and Mining Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253.

Under a coal, gas and mineral lease which provided that the lessor take a pro rata share of all oil and minerals and a certain rental per gas well, and that the lessee should either begin a well within a year or pay an annual rental of \$16, the lessor, having accepted the rental in lieu of a well, could not declare a forfeiture for failure to develop until the lessee had failed for one year upon notice to drill a well, *Monarch Oil, Gas & Coal Co. v. Richardson*, (Ky. 1907) 99 S. W. 668.

Improvements. Where on appeal from a judgment for the plaintiff in an action to enjoin the defendants from interfering with its operations on their land under an oil lease it was held that the plaintiff's rights had terminated and judgment was reversed and the cause remanded, with directions to dismiss the petition, the litigation was ended, and upon the filing of the remand it became the duty of the lower court to restore possession to the defendants irrespective of any rights acquired by the plaintiffs because of improvements put on the land between the issuance of the injunction and the decision on appeal, *Penn Lubricating Co. v. Bay State Petroleum Co.*, (Ky. 1906) 96 S. W. 1118.

Sec. 441. Oil and gas leases—Extension or termination—Abandonment.

Release. A gas and oil lease which recited a consideration of \$1 and also imposed upon the lessee an unconditional obligation to sink one or more wells within 18 months and begin work on the first one within six months, and in case they failed so to do, the lessors might elect to declare a forfeiture subject to the lessee's right to continue the lease by paying 10

cents per acre annual rental, was not a mere void unilateral contract but a valid lease. A release of such a lease was good consideration for the lessee's agreement to convey certain of the land and pay the lessor, out of the proceeds of a sale of other lands covered by the lease, a certain sum of money, *Great Western Oil Co. v. Carpenter*, (Tex. Civil Appeals 1906) 95 S. W. 57.

Misrepresentation by the vendor upon which the vendee depended as to the location and size of oil lands covered by a lease for oil and gas purposes, by which the vendee is obliged to develop the property by drilling a well and paying part of the proceeds to the vendor, though innocently made amounts to constructive fraud and gives complete right of rescission, *Bruner v. Miller*, 59 W. Va. 36, 52 S. E. 995.

Extension. Although under the civil law the court may grant a further time than that stipulated for the performance of a contract of lease, it will refuse so to do in a gas and oil lease when the party in default furnished no excuse for non-performance. From its nature an early performance was expected by the other party, *Murray v. Barnhart*, 117 La. 1023, 42 S. 489.

"In an action by a lessee to enjoin a lessor from interfering with the possession of the leased premises, and to extend the term of the lease for three years, 11 months and 20 days (this being the time which it is alleged an action brought by one of the lessors to have the lease declared void, was pending before final decision), a petition which alleges that the lessees were licensed to operate for oil, gas or minerals for 10 years, to be extended so long as oil or gas should be produced in paying quantities, where such petition showed that the term of the lease (10 years) had elapsed, and no well or wells had been drilled, and no oil or gas has been produced, but which alleges as an excuse therefor that the action brought to have the lease adjudged void was brought nearly six years after the execution of the lease, was pending in the district court about two years, when it was decided in favor of lessee, was then appealed to the Supreme Court, where it was pending nearly two years, and was affirmed, such petition, failing to allege the omission of any act required by the contract to be done by the lessors, or that during the term they did anything whatever to interfere with the operations of lessee other than bringing the action, and failing to allege that any restraining order or stay of judg-

ment was procured, does not state facts sufficient to show that the lessee was prevented from performance on its part, and is insufficient to invoke the equity powers of the court to extend the lease," *Lanyon Zinc Co. v. Burtiss*, 72 Kan. 441, 83 Pac. 989.

Abandonment. When the lessee of a gas well, who has found gas in paying qualities, finds the gas has begun to give out and abandons the well, he must give formal notice of his abandonment to the owner or he will be liable for the rental for another year, as the mere abandonment although accompanied by the disconnection of its pipes with one well and the drawing of the casing is not sufficient in itself. A notice of abandonment given one day after the year has expired does not relieve the lessee from the rental for the new year, *Wilson v. Philadelphia Co.*, 210 Pa. 484, 60 Atl. 149.

Forfeiture. Oil and gas are not subjects of conveyance until under control by diversion into artificial channels and leases thereof are not ordinary leases so that the stipulation therein that the lessee might reconvey the grant did not give the lessor the option to terminate it at pleasure, *New American Oil Co. v. Troyer*, 166 Ind., 402, 77 N. E. 739. A gas lease will not be declared void for any of the following reasons: (1) That the lessee, at the time he executed the contract, was unable to perform an option, by furnishing gas at the end of five years, to keep the lease alive; (2) That the lessee did not begin work at once, though, by the contract, given five years to do so; (3) That the contract was to some extent ambiguous; (4) That, although the receipt of royalty was material, operations need not have been begun for five years, *Ringle v. Quigg*, 74 Kans. 581, 87 Pac. 724. Where a lessee under a lease to explore for oil and gas by drilling a well, which contained a clause allowing him to abandon it and remove the buildings and machinery placed thereon, put buildings and machinery thereon but failed to drill a well and thereupon the lessor cut up the buildings for fuel and sold the machinery the lessor was liable for conversion although the lessee was a trespasser upon the expiration of the lease. The lessor cannot recover damages for the lessee's failure to explore without showing that there was oil and gas in the land, *Duff v. Bailey*, (Ky. 1906) 96 S. W. 577.

The lessor leased certain oil land in consideration of \$1.00 to the lessee for 10 years with a fixed yearly rental per acre if a

well was not drilled within two years, with the option to the lessee to surrender the lease and be fully discharged from all damages at any time. This was not a unilateral contract which could be revoked at any time by the lessor, but after he had received the consideration of \$1.00 and two years rent, the lessor had no right to break the contract as long as the rent was paid, *Pittsburg v. Vitrified Paving, & B. B. Co. v. Bailey*, (Kan. 1907) 90 Pac. 803.

Sec. 442. Oil and gas leases—Effect of two leases on same property—Actions—Receiver.

Effect of two leases on same property. A widow granted a lease of the oil and gas land in the homestead to A. without her children joining in the conveyance. Subsequently the children conveyed all of their interest to B. with full notice of the previous lease, and A. and B. were each held to possess an equal half interest in the property, *Compton v. People's Gas Co.*, 75 Kan. 572, 89 Pac. 1039.

Action. Under a lease taken in the plaintiff's name for the benefit of himself and another, a third interest being later assigned to a third person, the plaintiff was a trustee under an express trust within the meaning of Missouri Rev. St. 1899, section 541, permitting such a person to sue alone, *Geer v. Boston Little Circle Zinc Co.*, (St. Louis Appeals 1907) 103 S. W. 151.

Appointment of receiver. Where lands are chiefly valuable as oil lands and it appears that the plaintiffs will probably succeed in establishing title thereto, the court has power under Tex. Rev. St. 1895, art. 1465, to appoint a receiver to take charge of and conserve the per cent. of the oil output, which will fall to the claimants in case they ultimately succeed, *West v. Hermann*, (Tex. Civil Appeals 1907) 104 S. W. 428.

Sec. 443. Oil location on public lands. Forfeiture. The act of Feb. 11, 1897, c. 216, 26 Stat. 526 (U. S. Comp. St. 1901, p. 1434), was construed as forfeiting the rights of a locator of a mining claim on oil lands if he had not remained in possession and either discovered oil or prosecuted the work of exploration diligently. When a cabin was erected which could not be used and the watchman was away and none of plaintiff's agents had been on the property for months before the defend-

ants located their claim, the locator could not claim to be in possession, *New England & C. O. Co. v. Congdon*, (Cal. 1907) 92 Pac. 180.

PARTITION

Reimbursement for improvements on partition, see *ante*. § 260.

Whether lien and right of dower involve a freehold in partition, see *ante* §7.

Sec. 444. By agreement—Parol—Under power. A contract in writing partitioning the "home place" between four brothers, mutually binding themselves to each other in a specified sum, that if any of the lands held and improved by one should be lost, the others should make it good, was "color of title" together with the open, notorious possession of 30 years. A deed executed to a brother by the plaintiff before the deed of partition was executed, and during a temporary separation from his wife and lying dormant did not supersede the subsequent agreement in which a joint ownership was recognized, nor permit one of the parties to claim title to the portion set apart to either of the other parties, *Stover v. Stover*, (W. Va. 1906) 54 S. E. 350.

A *parol partition* of lands, if followed by possession in accordance with the agreement is effective, *Sires v. Melvin*, (Ia. 1907) 113 N. W. 106.

A person having the power by appointment to divide and distribute real estate amongst certain people may accomplish such division and distribution by appointing real estate to one person who is an object of the power upon condition of payment of a certain sum to other persons also objects, *Monjo v. Woodhouse*, 185 N. Y. 295, 78 N. E. 71.

Sec. 445. Prerequisites. Partition will not lie where certain defendants are in adverse possession, *Shepherd v. Fisher*, (Mo. 1907) 103 S. W. 989. A grant to a widow of a life interest in property left by her deceased husband, executed by his heirs, will bar their right to a partition of the land, *Henderson v. Henderson*, (Ia. 1907) 114 N. W. 178. When

all the parties interested in a petition for the sale and partition of real estate are present, and the will grants implied authority to sell the real estate, the petitioners may have an order for the sale of the real estate, *Foil v. Newsome*, 138 N. C. 115, 50 S. E. 597. Where only one of several heirs insist upon a sale in partition proceedings the court has no right to decree a sale without their consent unless it finds, first, that a partition in kind cannot be conveniently made, and second, that the interests of the parties owning the land will be promoted by the sale, *Croston v. Male*, 56 W. Va. 205, 49 S. E. 136.

Not where title is in dispute. Partition of land cannot be made where title is in dispute, and there is no jurisdiction in equity to try title to land, and then make partition, upon a bill for the construction of a will and for partition, nor upon a bill to quiet title and for partition, where the party seeking to quiet title is not in possession of the land. In this case the complainants and defendants both claimed under the will of J. L. W., and the complainants sought to set aside conveyances by his widow of the whole property to defendants, as made without authority under the will and also as fraudulent and without consideration, and asked that the court consider the whole matter as a Court of Equity and then grant partition. The court held, however, that the question of title must first be settled, and that it could be tried out fully in an action at law, *Warren v. Warren* (Mich. 1908) 114 N. W. 867.

Sec. 446. Who may have—Minor's interests—Title. Grandchildren suing to enforce a trust deed executed by their father, of property under deed of partition, are not estopped from suing for general partition under the will of their grandfather, *Parrott v. Barrett*, 70 S. C. 195, 49 S. E. 563. Shannon's Tennessee Code sections 5042, 5020, 5010 and 5070 as to sales for partition, construed. The fact that contingent remaindermen are not entitled to partition does not affect the right of life tenants, *Rutherford v. Rutherford*, 116 Tenn. 1112, 92 S. W. 1112.

A beneficiary under a trust who has no legal estate in the land cannot maintain a bill for partition under Hurd's Illinois Rev. St. 1903, c. 106, Section 1, *Mason v. Mason*, 219 Ill. 609, 76 N. E. 692. Where a testator left all his real estate to his widow, "to be by her paid or divided equally" among his four children "as she may deem best for each of those children."

She "having power to sell and dispose of any and all—property—for the payments of my just debts" the children could not maintain a bill for partition and an accounting of rents and profits until the widow exercised the power under the will, *Goodrich v. Goodrich*, 219 Ill. 426, 76 N. E. 575.

Minors. The right of co-owners of property to institute a suit for the partition of property against minors who own it with them, without the prior sanction of a family meeting, authorizing the minors to stand in judgment, is beyond question in Louisiana, *Becnel v. Stewart*, 117 La. 744, 42 S. 256. In Louisiana the drawing of lots is an essential formality in a judicial partition where a minor is interested. Unless this be done the partition is merely provisional and the minor has either five or ten years from emancipation or majority within which he may sue for a definite partition, *Rhodes v. Cooper*, 118 La. 299, 42 S. 943. Where adult devisees under a will by its terms are entitled to have their share in land set off to them they may obtain partition although some of their co-devisees are still infants. In such a proceeding a sale may be made. Under N. Y. Civ. Code Prac. section 448, a service in such a suit upon an infant party out of the state and upon the person with whom she was there living was sufficient, especially in view of the fact that her mother with whom she lived when at home was later appointed her guardian ad litem and filed an answer, *O'Donaghue v. Smith*, 184 N. Y. 365, 77 N. E. 621.

Title necessary. The plaintiff owning in fee an undivided half interest in a piece of real estate had sufficient title to maintain a suit for partition against the holders of life estates in the other half interest, *Johnson v. Brown*, 74 Kan. 346, 86 Pac. 503. In partition proceedings, evidence of title may be shown to exist in a child of the deceased and the defendant who alleges that a marriage existed between them, although the child was not a party to the record, *Pooler v. Smith*, 73 S. C. 102, 52 S. E. 967.

Sec. 447. Statutes. Alabama Code 1896, section 3178, as to the partition of lands by the probate court construed together with section 1469 as to advancements, *Bozone v. Daniel*, (Ala. 1905) 39 S. 774. Numerous sections of the Code of Civil Procedure prescribing the details of proceedings for the partition of land are amended by Cal. Stat. 1907, ch. 329. Kentucky Code Civ. Practice section 490 providing for sales

where land cannot be divided among the owners without material impairment of its value, construed, *Hartring's Exr. v. Milward's Exr.*, (Ky. 1905) 90 S. W. 260. Kentucky Statutes 1903 section 4848 as to pretermitted children construed in connection with Kentucky Civ. Code Prac. section 490 as to judicial sales of property incapable of division, *Stine v. Goodman*, (Ky. 1906) 92 S. W. 612. Kentucky Civil Code Practice section 499, subsec. I as to petitions for the division of land, construed, *Barry v. Baker*, (Ky. 1906) 93 S. W. 1061. Kentucky Civ. Code Prac. section 490 as to partition sales of real estate construed, *Craddock v. Smythe*, (Ky. 1907) 99 S. W. 216. Louisiana Statutes as to partition construed, *Broussard v. Guiry*, 114 La. 913, 38 S. 616. The manner of obtaining the order for a sale for partition of estate held in trust is prescribed by Mass. Acts 1907, ch. 262, amending ch. 147 sec. 15 Rev. Laws. Private sales in the partition of land authorized by Mass. Acts 1907 ch. 361, amending ch. 184 Sec. 47 Rev. Laws. Missouri Gen. Statutes 1865 c. 152 relating to proceedings for the partition of real estate, construed, *Clark v. Sires*, 193 Mo. 502, 92 S. W. 224. Deeds in partition proceedings, made to one other than the purchaser, are made valid by N. J. Laws 1907 ch. 189. Sec. 3305, Code of 1858, regulating sales for partition and distribution is amended by Tenn. Acts 1907 ch. 403. St. 1898 Sec. 3101 and 3103, construed as to property subject to partition, *Plano Mfg. Co. v. Kindschi*, 131 Wis. 590, 111 N. W. 680.

Sec. 448. Partition of estate of decedent. Under Missouri Rev. St. 1899 sections 4611 and 4649A an omitted heir may maintain partition for his share of the ancestor's estate, *Breidenstein v. Bertram*, 198 Mo. 328, 95 S. W. 828. Where the power to partition lands was in the executors a court of equity will not interfere to order partition upon a bill filed within four and one half months of the testator's death, when such procedure is resisted by the executors. Neither would it assume jurisdiction upon the mere pretense of a woman that she was the testator's common-law wife where the executors dence that she was not, *Fischer v. Butz*, 224 Ill. 379, 79 N. E. had ample evidence that she was not, *Fischer v. Butz*, 224 Ill. 379, 79 N. E. 659. The fact that for sixteen years no creditor of the estate of an absent and unheard of heir had asked for administration is no bar to a suit by the other heirs for par-

tion in accordance with Missouri Rev. St. 1899 section 4384, *Chapman v. Kullman*, 191 Mo. 237, 89 S. W. 924.

Sec. 449. Whether division in specie or by sale ordered.

In a partition suit it was held that on the evidence the lower Court used proper discretion in refusing to allot to one party a certain share in specie, *Cooper v. Trout* (Ky. 1907), 102 S. W. 798. When a defendant in partition by tenants in common fails to deny that the lands are capable of equitable division the plaintiff need not prove they are, *Berry Lumber Co. v. Garner*, 142 Ala. 488, 38 S. 243. In a suit for partition of real estate a sale will not be held unless it is proved that partition cannot be conveniently made, and a draft of a consent decree cannot be entered after one of the parties has withdrawn his consent to such a partition, *Herold v. Craig*, 59 W. Va. 353, 53 S. E. 466.

Sec. 450. Partition sales—Setting aside—Conduct.

Setting aside sale. Where in a partition proceeding one of 18 parties was insane and the land was sold for less than the appraised value, although a guaranty was filed that upon resale it would bring a higher price and the purchasers deposited the increased sum such insane person would be entitled to, a resale was not ordered, *Abbott v. Beebe*, 226 Ill. 417, 80 N. E. 991. Where all the parties to a partition except one are estopped to contest it and upon his death the others are his heirs, they cannot through the acquirement of his interest attack it, *Chevalley v. Pettit*, 115 La. 407, 39 S. 113. Where in a partition sale an attorney who brought the suit failed to make mortgagees parties thereto, concealed the real condition of the title, and himself bought the property and the master in chancery failed to give the notices thereof required by the decree, the sale was set aside and his attorney's fees disallowed, upon a petition brought within three years of the sale by certain heirs, *Mansfield v. Wallace*, 217 Ill. 610, 75 N. E. 682. Where in a partition proceeding, several of the parties to which were minors, the land was appraised at \$9,000 and sold to the adult heirs for \$11,000, the chancellor might properly set the sale aside where the title being in doubt a third party who was not shown an abstract bid \$12,000 conditioned on a good title, and put up a \$1,000 bond to bind his bid, *Kiebel v. Leick*, 216 Ill. 474, 75 N. E. 187. A sale upon a bill for partition under the

general Chancery powers of the Court will not be set aside on the ground of inadequacy of price unless so gross as to raise a presumption of fraud, and in such a case those who ask for it must bring the offer into court, or make an advance bid, or give a guaranty or bond that there will be no loss on a resolve. In partition proceedings it is competent for the Chancellor to follow the practice at law as to the appointment of commissioners, *Schulz v. Haase*, 227 Ill. 156, 81 N. E. 50. Where as soon as certain non-resident parties to a partition suit, who were not represented by resident counsel, learned of a sale of the property appraised at \$11,600 for \$9,375 they caused a telegram to be sent signed by counsel and directed to the clerk of the court objecting to the confirmation of the sale upon the ground of inadequacy of price the court was justified in allowing the later filing of formal exceptions, as they later gave a bond for \$12,000 conditioned to secure a bid for \$11,600, and it appeared that the original bidders did not pay their bid until three of the four in the combination had sold out to the fourth at an advance, the court properly refused to confirm the sale, *Compton v. McCaffree*, 220 Ill. 137, 77 N. E. 129.

Security required from bidder. Upon the evidence it was held that the master in partition proceedings had complied with the decree which required him to post notices of sale in five of the most public places in the vicinity. Where upon the first sale the successful bidder failed to make payment within 20 days as required, thus necessitating a second sale, the master was justified in refusing her bid at the second sale unless she made or secured a deposit and in reselling to another person at a lower price, *Vaughn v. Newman*, 221 Ill. 576, (77 N. E. 1106.)

Sec. 451. Award of commissioners—Valuation. Where three referees are appointed to make partition of land, the court has power to confirm a majority report, *Bowlsby v. Gregory*, *Gregory v. Bowlsby*, (Iowa 1908) 114 N. W. 1060. The affidavit of one of the parties to a partition, supported by three witnesses, that the division was unequal as to value, was insufficient to overthrow the commissioner's report, *Mead v. Mead*, 31 Ky. Law Rep. 70, 101 S. W. 330. When commissioners in partition are appointed to decide the valuation of land, their decision will not be set aside even when parties make bids higher than the award of the commissioners, if the

bids are unsupported by a deposit, *Aldrich v. Aldrich*, 75 S. C. 369, 55 S. C. 887.

Sec. 452. Judgment—Form and contents—Rights of non-resident—Effect of—Estoppel to claim under. Under the express provision of the Missouri Statutes in partition advancements made to a son may be stated and adjudicated, *Shepperd v. Fisher*, (Mo. 1907) 103 S. W. 989. A decree of partition which settled all the rights of the parties, except in the mere matter of detail as to whether the property was susceptible of partition is final and the finding cannot be reviewed upon appeal, *Crowe v. Kennedy*, 224 Ill. 526, 79 N. E. 626.

Where an heir obtains a decree pendente lite appointing commissioners to a partition and assigns him his interest in a particular lot of land, the heir does not acquire title in severalty to the parcel until the allotment of the commissioners is approved by the court and a judgment is made out in accordance therewith, *Haden v. Sims*, 127 Ga. 717, 56 S. E. 989. As a decree pro confesso must conform to the pleadings, in a suit by one tenant in common against her co-tenants for a partition when the complainant alleges that two only of these have occupied the premises it is error to issue a personal judgment against all the co-tenants for the complainant's share of the rents, or to give a decree entitling her to a lien on the interests of them all, *Austin v. Barber*, 88 Miss. 553, 41 S. 265. Where a decree was rendered by a jury in a litigation concerning the property of the deceased owner, that "the jury further find, decree and direct that the estate of D. Senior" shall be divided as follows: "that the house now occupied by D. Junior shall be the property of his wife free from D.'s debts," this clause is to be considered as a voluntary conveyance by D. to his wife, *Dix v. Bigham*, 124 Ga. 1067, 53 S. E. 571.

Where in partition proceedings an award by arbitrators between certain heirs was repudiated by one of them upon coming of age and as a result the plaintiff and another were deprived of certain tracts awarded to them, the plaintiff could sue for equalization of the loss under Ky. St. 1903, section 2080, *Brownlee v. Bunnell*, 31 Ky. Law. Rep. 669, 103 S. W. 284. A testator, who died childless, devised land to his widow for life with remainder to the "heirs of her body." She married again, successfully sued her children to have the land sold, and the second husband as commissioner sold it and divided

land he owned among the children. It was held that the children by accepting the deeds did not ratify the sale and that the children of a daughter born after the entry of the decree, the daughter having died before the widow, were not bound by it as they took title, not by inheritance from their mother but directly from the will as heirs of the body of their grandmother, *Heady v. Crouse*, (Mo. 1907) 100 S. W. 1052.

Void. It was held that a decree of a chancery court providing for the division of lands in which an infant was interested made in pursuance of an agreement entered into by the infant's guardian without an order or sanction of any court, was void. "The chancery court neither approved nor disapproved of it, made no investigation to determine whether it should have been by the guardian and did nothing to give it life, force or effect. Parties purchasing under the decree in question had notice that it was void, and that they acquired no title," *Rankin v. Schofield*, 81 Ark. 440, 98 S. W. 674.

Rights of non-resident. In an action between parties for an accounting and division of land situated in Illinois, an Illinois court had jurisdiction to direct the amount due to be paid out of the land, although the defendant was a non-resident who did not appear in the action, *Williams v. Williams*, 221 Ill. 541 (77 N. E. 928.)

Effect of. In Alabama partition operates merely upon the possession, not the title, and thirty five years' possession, therefore, by one to whom land was thus set off does not raise a presumption of title as against the original owner, *Kennedy v. Rainey*, 145 Ala. 572, 39 S. 813.

A bill for partition, with decree and report of sale, decree of confirmation, and process issued in the cause, show a title in the purchaser at such sale which cannot be collaterally attacked, *Sweatman v. Dean*, 86 Miss. 641, 38 S. 231.

Estoppel. A party in interest is estopped from claiming his share in a partition if there is a delay of 10 years from the confirmation thereof, the land having been sold to innocent purchasers and another partition being out of the question, *Currens v. Lauderdale*, (Tenn. 1907), 101 S. W. 431.

Sec. 453. Attorney's fee. Hurd's Illinois Rev. St. 1905, C. 106, section 40 which provides for the taking of attorney's fees in partition proceedings in certain cases only, construed, *Jones v. Young*, 228 Ill. 374, 81 N. E. 1042.

Missouri Rev. St. 1899, section 4422, allowing a reasonable fee for the attorney bringing a partition suit, construed, *Padgett v. Smith*, 205 Mo. 122, 103 S. W. 943.

A purchaser who, pending the partition bought out the interest of some of the parties was properly ordered to pay the share of the attorney's fee which would have fallen upon his vendors, *Cooper v. Trout*, (Ky. 1907) 102 S. W. 798.

Where certain joint owners sued for partition and obtained an erroneous judgment, the other owners who employed another attorney to represent them and had the judgment set aside and a proper one obtained, were not obliged to have the fee of the attorneys for the owners who originally sued paid out of the proceeds of the sale and charged to all owners ratably, *Hemingray v. Hemingray*, (Ky. 1906) 96 S. W. 574.

Sec. 454. Jurisdiction—Practice—Pleading—Costs—Parties. The complainant, in partition against heirs, is not a competent witness as to her marriage to the deceased, *ex parte* affidavits are inadmissible, and under Hurd's Rev. St. 1903, C. 103, section 16, the appointment of three commissioners is essential to a valid partition. Claims against the decedent's estate may not be paid out of the proceeds of a petition sale, *Crane v. Stafford*, 217 Ill. 21, 75 N. E. 424.

Notice. Commissioners in partition are not required by statute to give notice to the parties interested, yet the necessity must be implied and failure of such notice will be ground for setting aside the report of the commissioners, *Wamsley v. Mill Creek Coal & Lumber Co*, 56 W. Va. 296, 49 S. E. 141.

A service of a notice of partition proceedings on another tenant in common by publication, when the tenant lives outside the state, is valid when approved by the judge. Civ. Code 4788, 4786 (Van Epps Code Supp. s 6197), *Lochrane v. Equitable L. & S. Co.*, 122 Ga. 433, 50 S. E. 372.

Jurisdiction. Kirby's Arkansas Digest Sections 6060 et. seq. as to venue in action for partition of land, construed. Sections 5785 et. seq. authorizing sales in such proceedings confer the only jurisdiction therefor, as at common law there was no right to such a sale, and must therefore be strictly followed, *Cowling v. Nelson*, 76 Ark. 146, 88 S. W. 913. A suit may be brought for partition of real estate by the owner who has held an equitable estate until by a decree of the court he was

granted specific performance of an agreement and so held the legal title by P. L. 1902, p. 525, s. 45. Although an appeal was taken from the decision of the Court of Chancery yet it still possessed jurisdiction of the suit for partition subject to the reversal of the decree for specific performance by the higher court, *White v. Smith*, 70 N. J. Eq. 418, 60 Atl. 399.

Costs. Rev. Stat. Ch. 90 Sec. 10 regulating costs on petitions for partition of real estate is amended by, Me. Laws 1907, Ch. 58. Where, in partition proceedings, one of the defendants through her answer caused much of the litigation, the costs should be deducted from her share, *Williams v. Jones*, 74 S. C. 258, 54 S. E. 558.

Parties. Where a father and his children owned land and he executed a deed purporting to convey the entire interest the immediate grantee and subsequent grantees were properly joined in an action to set aside the conveyance and for partition and sale, *Thames v. Mangum*, 87 Miss. 575, 40 S. 327.

Where the partition of land was not the sole object of a suit as originally instituted, and subsequent decrees and proceedings had made it in effect a creditor's bill for the satisfaction of liens due by the coparceners and binding on the estate to be partitioned, it was error to dismiss as a party to the suit one claiming adverse title, who desired relief through the partition suit, *Moon's Adm'x. v. Highland Development Co.*, 104 Va. 551, 52 S. E. 209.

In Mississippi reversioners and remainder-men should not be made parties to partition proceedings. A decree therein is an entirety and cannot be reversed as to certain parties only, *Lawson v. Bonner*, 88 Miss. 235, 40 S. 488.

When a will devised a share in land to a trustee for the benefit of C and authorized the trustee to use so much of the principal as should be necessary for C's support, and that of his children, and provided that the remainder at C's death should go to her children, the latter took a remainder contingent upon their surviving their mother and any part of the fund being still in existence at that time. The children were, therefore, not necessary parties to a partition, *Collins v. Crawford*, (Mo. 1907), 103 S. W. 537.

When a co-tenant has granted his interest to a trustee, reserving a life estate for himself and providing that a title should rest in his children on his death, a partition suit may be brought against the trustees and the life tenant by the other

co-tenants and it is not necessary to make the children parties to the partition as required by Rev. St. 1899, s. 3480 as they do not have an interest adverse to the plaintiff within the meaning of the statute; but the court does not pass on the rights of such children when they are not before the court, *Field v. Leiter*, (Wyo. 1907) 90 Pac. 378.

Pleading. An allegation in an answer to an action for partition of land that one of the defendants paid part of the purchase price is immaterial without a further allegation that he thereby acquires an interest in the land, *Reeves v. Morgan*, (Ky. 1907) 100 S. W. 836.

In partition a plea that the lands were sold to the State for taxes and that the respondent claimed them and paid the State a certain sum for which he received a deed from the State Auditor is insufficient as it did not thereby appear that the respondent became the owner or held possession adversely to his co-tenants, *Jordan v. Jordan*, (Ala. 1905) 39 S. 992.

PARTY WALLS

Sec. 455. Party wall agreements—Construction—When run with land. Although the contract of sale expressly mentioned an agreement to use the wall above the surface as a party wall, an agreement that if the owner of the wall should build another story the other could use it was void for lack of consideration, *Trulock v. Parse*, (Ark. 1907), 103 S. W. 166.

A clause in a party-wall contract was as follows: "And the said parties here convey to each other, their heirs and assigns, reciprocally, such interest in the land covered or to be covered by said party wall as may be necessary to carry out the terms of this agreement." Held—this gave simply an easement, *Scottish-American Mortg. Co. v. Russell*, (S. D. 1905) 104 N. W. 607.

Running with the land. An agreement whereby one adjacent owner was to build a party wall on the boundary line and the other to pay one-half the cost when used constitutes a covenant running with the land, *Ferguson v. Worrall*, 31 Ky. Law Rep. 219, 101 S. W. 966.

The presence of a party wall, built under an unrecorded contract to divide the cost, is not notice to a purchaser of one

lot of his liability for one-half the cost, *Scottish-American Mortg. Co. v. Russell*, (S. D. 1905), 104 N. W. 607.

The agreement of an adjoining owner to pay part of the cost of a party wall becomes a charge in the nature of an equitable lien upon the lot on which the wall was erected and is enforceable in equity, as under the contract when the wall was built the builder became the sole owner thereof, with an easement over the strip of the adjoining lot built upon, subject to the right of the owner of the adjoining lot to use the wall upon payment of half the cost thereof. The whole wall, together with the easement over the adjoining lot passed under the deed executed by the builder as an appurtenance to his lot, *Rugg v. Lemly*, 78 Ark. 65, 93 S. W. 570.

Sec. 456. Rights of parties—Windows—Advertising—Expense of building and additions. Code Sec. 2996, 2997, 2999 and 3003, relative to construction and repair of party walls, construed, *Howell v. Goss*, 128 Ia. 569, 105 N. W. 61. Under Code Tit. 14 c. 10 sec. 2994-3000 owners of party walls may not extend the beams of their buildings beyond the center of the wall, *Lederer & Strauss v. Colonial Inv. Co.*, 130 Ia. 157, 106 N. W. 357.

Windows. The defendant building a party wall, opened windows in it overlooking the adjoining building, but a mandatory injunction was issued to compel the closing of the window openings, although the defendant stood ready to close them whenever the plaintiff wanted to use the wall, *Coggins & Owens v. Carey*, (Md. 1907) 88 Atl. 673. An owner of a party wall may be restrained from closing up windows in his neighbor's house in the wall although if he built he would have that right, *Lengyel v. Meyer*, 70 N. J. Eq. 501, 62 Atl. 548.

Advertising. An agreement for the erection of a party wall which provides that it shall be the common property of both parties and that the second party shall have full right to use it according to the custom of partition walls gives the first party no such interest in the second party's side as to entitle him to an injunction against the use of it for advertising purposes, *Lappan v. Glunz*, 140 Mich. 609, 104 N. W. 26.

Statute of limitations. For application of statute of limitations (Code Sec. 3447) to party-wall agreements governed by Code Sec. 2995, see *Pier v. Sabot*, 134 Ia. 357, 111 N. W.

989. The statute of limitations does not run in favor of one using a party-wall, so as to defeat the claim of the other owner, so long as the former denies that his use is such as to impose liability, *Pier v. Salot*, (Ia. 1906) 107 N. W. 420.

Additional Burden—Expenses. A person who erected a building on his own land, placed the joists in his neighbor's wall, and used it for a support for 21 years, cannot in the absence of an agreement put any further burden on the wall, *Bright v. Morgan*, (Penn. 1907) 67 Atl. 58. Where a party-wall answers the purposes for which it was intended, the expense of rebuilding, or of increasing the height or width, must be born by the owner who ordered the changes made, *Bellenot v. Laube's Ex'r*, 104 Va. 842, 52 S. E. 698. Two parties owning adjoining lots made an agreement that if either one were the first to build a building the other party would pay half of the expense of building the party-wall between the lots. The plaintiff's architect made an estimate of the expense of building the wall as provided by the agreement, and when the defendant refused to pay it, the burden of proof was on him to prove that the estimate was not accurate, *Watkins v. Glas*, (Cal. 1907) 89 Pac. 840.

PERPETUITIES

Sec. 457. Statutes—Contracts—Wills. Kentucky Statutes 1903, section 2360 forbidding perpetuities construed, *Robson v. Gray*, (Ky. 1906) 97 S. W. 347. Kentucky Statutes 1903, section 2360 forbidding the suspension of the absolute power of alienation by limitation or condition for a longer period than lives in being at the creation of the estate and 21 years and 10 months thereafter construed, *Brown v. Columbia Trust Co.*, (Ky. 1906) 97 S. W. 421.

A contract binding upon an owner and his executors whereby the other party was to take entire charge of the owner's land and dispose of it according to his judgment alone did not violate the rule against perpetuities, *Mills v. Smith*, 193 Mass. 11, 78 N. E. 765.

When the habendum in a deed was to the grantee and his children with a further provision that upon the death of himself and children it should go to the grandchildren, but if

there be none then to revert to the other heirs of the grantor, the grantee took a life estate with a remainder in fee to all his children, whether in esse at the date of the conveyance, or born afterwards. The gift to the grandchildren is void because in contravention of the Kentucky Statute against perpetuities. (Section 2360 Ky. St. 1903), *Brumley v. Brumley*, (Ky. 1905) 89 S. W. 182. Civ. Code §715, 716, was construed as rendering void a trust preventing the right of alienation for thirty years after the death of the last survivor of the beneficiaries if they had children, *Campbell-Kawannakoa v. Campbell*, (Cal. 1907) 92 Pac. 184.

Option. A firm obtained an option on farm property under a printed option containing the proviso that it could be extended from year to year on the payment of an additional sum of money. The firm paid the additional amount of \$10.00 per year to extend the option, but the optionee refused to accept the last payment and the option was declared void by the rule against perpetuities; the option extended its provisions to the heirs, executors and assigns of both parties to the agreement, *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S. E. 524.

Valid provisions in wills. Where a testator gave his sister an annuity and the residue to trustees to pay from the net income a certain sum to his widow for life, and the remainder to other persons until the death of two named daughters when the remainder should vest, the trust was not invalid as a perpetuity, the provision for the widow being a charge on the residue whether held in trust or free from it, *People's Trust Co. v. Flynn*, 188 N. Y. 385, 80 N. E. 1098. A will provided for the payment of certain amounts to testator's grandchildren, the final payments to be at the age of 45, the share of either dying under 45 to be paid to the survivor at the same periods; if both should die before receiving final payment the residue which would have been paid to them to go to the brothers and sisters, nephews and nieces of testator and his wife. Held—This was not a violation of the rule against perpetuities, *Hull v. Osborn*, (Mich. 1907) 113 N. W. 784. A devise of a farm to two devisees upon condition that they shall live on it, that it shall never be sold, leased or rented, no blue grass field be plowed, no stock pastured thereon except such as is owned by the devisees, and no tobacco raised, but in case either devisee die without issue then her share shall go to

the survivor, and should both so die then over to a third person, is not void as creating a perpetuity because the limitations only bind the land during the life time of the devisees, *Holt's Ex'r v. Deshon*, 31 Ky. Law Rep. 744, 103 S. W. 281. A devise to trustees to hold during the life of the testator's daughters' children and at their decease to pay over to her grandchildren as they respectively reach the age of 21, was not void as to the grandchildren whose parents were born before the death of the testator, although it was as to those whose parents were born after that event. Each of the daughter's children took a life estate which vested at the testator's death, subject to be reopened upon the birth of after born children, *Minot v. Doggett*, 190 Mass. 435, 77 N. E. 629. Where a testator gave his wife and two sons life estates and after their termination provided that the remainder be paid over to the issue of the sons or "failing such issue, to my right heirs at law," and upon the death of one of his sons during his lifetime executed a codicil confirming the will, revoking the bequest to the deceased son, and increasing the life estates of the wife and other son, it was held that upon the death of the other son unmarried and without issue the heirs of the testator entitled to take were to be determined as of the date of the death of this latter son. Such a gift in remainder was not too remote, *Brown v. Wright*, 194 Mass. 540, 80 N. E. 612. A devise to a widow in trust to be used by her until her youngest child reaches 21 and then to be divided between herself and the children created a mere passive trust under which the trustees took no title but it devolved directly upon those entitled to the ultimate beneficial interest under N. Y. Laws 1896, p. 570, c. 547. As the testator clearly intended his youngest surviving child the devise was not void within the New York rule forbidding the suspension of the power of alienation (1) during a fixed period not measured by lives, or (2) during the existence of more than two lives in being, *Jacoby v. Jacoby*, 188 N. Y. 124, 80 N. E. 676. Under a devise to "Frederick Sauer" of land in East St. Louis and all property owned by the testator in Switzerland which provided that after his death the real estate shall revert to "my heirs in Switzerland, but only after the payment by them to the heirs of Frederick Sauer of any improvements made on the real estate herein devised," it was held that the remainder to the heirs in Switzerland was not void as in conflict with

the rule against perpetuities because such heirs were those persons who were heirs at the time of the decease of the testatrix, and under the treaty between the United States and the Swiss Confederation such heirs must assert their rights within three years of the death of the life tenant, *Frederick Sauer, Hill v. Gianelli*, 221 Ill. 286, 77 N. E. 458. Property was devised to trustees in trust for testator's surviving heirs at law, to divide the income annually between his wife and children during their lives and upon the death of the children the property to pass to their heirs or the heir or heirs of the survivor, in equal proportions as tenants in common to them and their heirs and assigns forever. Held—The trust was not violative of the rule against perpetuities as contained in Comp. Laws 1897, Sec. 8797, *Foster v. Stevens*, 146 Mich. 131, 109 N. W. 265.

Invalid provisions in wills. It was held that a will written by the testator himself clearly showed an intention of creating one indivisible trust to endure for the three lives of the sons and was therefore void within the New York Statute, *Central Trust Co. v. Egleston*, 185 N. Y. 23, 77 N. E. 989. When the testatrix devised her estate in trust for her children, under the care of her husband as trustee, with the distribution of the estate postponed until after the death of the last surviving child and ten years after the coming of age of the youngest grandson, the trust was void under the rule against perpetuities, and the heirs at law were entitled to immediate possession, *Kountz's Estate, in re* 213 Pa. 399, 62 Atl. 1103. A devise to a widow for life, with remainder to a son as trustee for a daughter for life and her bodily heirs if such heirs had issue but if they died without issue to revert to the testator's heirs, was void within the rule against perpetuities. Although the will also devised portions to sons-in-law upon condition that they discharge a certain mortgage as the testator intended one general scheme of disposing of his property and as that had failed these latter otherwise valid devises fail with the invalid ones, *Sheppard v. Fisher*, (Mo. 1907) 103 S. W. 989. A devise to an executor to hold for 25 years from the date of the probate of the will in trust for certain grandchildren in whom, or their heirs, it was to vest absolutely at the end of that period, was in violation of the rule against perpetuities because the probating of the will was a condition precedent to the vesting of an estate in the executor. As, however, the gift to the grandchildren was not so interdependent with the estate at-

tempted to be given to the executor as to render void the devise to them the grandchildren took an absolute fee simple, *Johnson v. Preston*, 226 Ill. 447, 80 N. E. 1001.

PLATS AND SURVEYS

References in deeds to, see *ante* §79.

Government surveys as evidence of boundaries, see *ante*

§30

Government survey and conclusiveness of field notes of, see *post* § 474.

As to estoppel of owners of lots sold by plat and vacation of such plat, see *ante*, §151.

Sec. 458. In general—Effect of as referred to. Where lots of land were sold according to an unrecorded plat and the later recorded plat contained a mistake in that the lots were numbered in reverse order, the original plat governed, *Mason v. Gates*, (Ark. 1907) 102 S. W. 190. The description of land in a recorded plat will not control that agreed upon by the parties for 25 years; e. g. where the actual, not the platted, location of a road was regarded as the line between two lots, *Quade v. Pillard*, (Ia. 1907) 112 N. W. 646. The purchaser of a lot indicated on a plat showing a space adjoining reserved for a street will not be entitled to the reserved space; the plat having been acknowledged and recorded, *Backman v. City of Oskaloosa*, 130 Ia. 600, 104 N. W. 347.

When a deed called for a beginning at a stake on the east line of a tract entered in the name of B and 47 poles north of the south-east corner of such tract, parol evidence was admissible to show the true location of the B survey. The rule that a survey controls the description in the deed is not contrary to the public policy of the registration laws or the statute of frauds and may be applied in ejectment as well as in a bill to reform, *Staub v. Hampton*, 117 Tenn. 706, 101 S. W. 776.

Sec. 459. Statutory. Illinois Rev. Laws 1828-29, p. 184, as to the making of town plats by county commissioners, construed, *Spalding v. Macomb, &c. Ry. Co.*, 225 Ill. 585, 80 N. E. 327. Under Illinois Laws 1901, p. 307, a permanent survey

and decree is not *res adjudicata* as to title but only estops the parties from claiming that the boundaries under the decree are not those originally established by the United States, *Krause v. Nolte* 217 Ill. 298, 75 N. E. 362. Sec. 3366, 3367 and 3368 prescribing certain details as to boundaries, the form of plats and fees for filing are amended by Minn. Laws 1907 Ch. 438. Act of 1890, regulating boom companies, is amended, as to filing of plats of such part of shore lands as are to be used, by Wash. Laws 1907 Ch. 52.

A certain survey of sections and quarter sections not being made according to law was no evidence as to the boundary between two quarter sections severed by it, *Phillips v. Hink*, (S. D. 1908) 114 N. W. 699.

When at the time the United States Government Survey was made certain lands were all under water but later by the recession of the Meramec River have all become dry land they constitute an accretion to the owner of the upland. As it is well settled that corners established by the United States surveyors in surveying the public lands are conclusive as to the actual location of the boundary lines of sections and such subdivisions thereof as are authorized by the laws of the United States, the only question in a boundary dispute is as to what the corner was which the survey established. As it appeared that when the survey of section 13, township 43, range 5 was made the Meramec River was treated as a navigable stream and the corner fixed at "an inaccessible point," then under water, the owner of the section takes title to that corner upon the recession of the river. See plan, *Frederitzie v. Boeker*, 193 Mo. 228, 92 S. W. 227.

Sec. 460. Evidence. Plats recognized as valid for 60 years and used as the foundation for deeds are admissible in evidence to show the description and location of a given lot even though they are so defective as not to be entitled to record, *Pere Marquette R. Co. v. Graham*, (Mich. 1907) 114 N. W. 58. Evidence that the owners of land at the date of the location of a town later conveyed lots according to an earlier plat and in the deeds referred to the plat is incompetent because such deeds were not introduced and it was not shown that they or a recorded copy thereof could not be obtained, *Town of Hope v. Shiver*, 77 Ark. 177, 90 S. W. 1003. In a suit of one railway against another railway company to pre-

vent the second company from constructing a railroad track across a certain tract of land, of which the first company alleged ownership, on the hearing of the application for interlocutory injunction, it was not error to admit in evidence the affidavit of the surveyor and an attached plat of land; it being deposed by the witness that he had made the survey and the plat and that it truly represented the land in dispute, *Atlanta & W. P. R. Co. v. Atlanta B. & A. R. Co.*, 125 Ga. 529, 54 S. E. 736.

POSSESSION

See ADVERSE POSSESSION, IMPROVEMENTS, NOTICE.

POWER OF ATTORNEY

Sec. 461. In general. In Kentucky a deed by an attorney in fact by virtue of an unrecorded power of attorney is valid as between the parties and those claiming thereunder although not as against "creditors and purchasers," *Godsey v. Standifer*, 31 Ky. Law. Rep. 44, 101 S. W. 921. A power of attorney to convey Kentucky land acknowledged before a justice of the peace was not entitled to record and the record thereof is not admissible in evidence to prove the power although the original instrument if properly produced would have been admissible as an ancient instrument, *Ball v. Loughbridge*, (Ky. 1907) 100 S. W. 275.

Where by statute the Bath Seminary Corporation was authorized to sell real estate and its powers were vested in a president and board of directors it was held that a power of attorney signed "Bath Seminary, by R. Gudgell, President" purporting to give the attorney power to sell real estate belonging to the seminary was void in the absence of evidence that a majority of the directors authorized Gudgell as president to execute the power of attorney, *New Glasgow Planing Mill Co. v. Shaw*, (Ky. 1907) 99 S. W. 661.

PUBLIC LANDS

Irrigation works on public lands, see *ante*, §285.

Location of mining claims on public lands, see *ante*,

MINES.

Location of oil claim on public lands, see *ante*, §443.

Locating homestead on public lands, see *ante*, HOMESTEAD.

Sec. 462. Indian lands—Transfer—Lease—Action. 30 Statutes (U. S.) 495, c. 517 (The Curtis Bill), 25 U. S. Statutes 38, c. 13, 28 U. S. Stat. 502, c. 330, and 32 U. S. Stat. 502, c. 330 being various acts of Congress as to the title to Indian lands and the purchase by railroads of land in Indian Territory, construed, *Choctaw R. R. Co. v. Bond*, (Indian Terr. 1906) 98 S. W. 335. *Heydecker's Gen. Laws* (N. Y.) p. 268, c. 5, section 56, as to the allotment of lands to Indians on the Tonawanda reservation construed in connection with Laws 1902, p. 853, c. 296, an act amending the Indian Law in relation to the erection of poles and wires on the Tonawanda reservation, *Jemison v. Bell Telephone Co.*, 186 N. Y. 493, 79 N. E. 728. One who made an entry on Cherokee lands filed a bond in February, 1880, and paid therefor in December, 1884. A correct construction of chapter 11 of the Code would show, that the failure of the defendant to make full payment within four years was not a forfeiture of the entry, *Frazier v. Gibson*, 140 N. C. 272, 52 S. E. 1035.

Action. In an action of unlawful detainer brought by the Indians, an allegation that they were owners entitled to immediate possession is good upon demurrer, the fact, if true, that they were holding in excess of their share of the lands of their nation or tribe in violation of the Curtis Bill being a matter of defense to be set up in answer. In Indian Territory a purchaser of land may bring unlawful detainer against the seller's lessee who holds over after the expiration of the lease, although the purchaser has never been in actual possession, *Thomason v. McLaughlin*, (Indian Terr. 1907) 103 S. W. 595.

Lease. Act Feb. 28, 1891, §3 (26 Stat., 794, c. 383) relating to leasing Indian lands, was construed as rendering invalid a lease by an Indian allottee to a white man which was

not approved by the Secretary of the Interior, *Williams v. Steinmetz*, 16 Okl. 104, 82 Pac. 986.

Transfers by Indians. "Instruments transferring the right of possession to Indian lands from one Indian to another, have always been regarded more in the nature of bills of sale, and as such they need be neither acknowledged nor recorded," *Blocker v. McClendon*, (Indian Terr. 1906) 98 S. W. 166. Where the United States deeded a tract of land to an Indian, forbidding alienation, he had no right to bequeath the property by will, *Jackson v. Thompson*, 38 Wash. 282, 80 Pac. 454. In Indian Territory an Indian cannot convey lands to a U. S. citizen, nor can such a citizen take title from an Indian. Under the so-called Creek agreement approved March 1, 1901, see U. S. Statutes Chapter 677 p. 872, the Secretary of the Interior has sole power to allot lands and designate townsites, *Capital Townsite Co. v. Fox*, 6 Indian Ter. 222, 90 S. W. 614. Act of Congress, March 3, 1903, c. 1816, 33 Stat. 565, removing the restrictions against the conveyance of land by the Puyallup Indians, was construed as making the Indians the owners of the land in fee simple, *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9. Acts of Congress March 3, 1893, (Wilson Act) 27 Stat. 633, was construed as rendering void a deed by an Indian to land not selected for sale by the commission within 10 years after the passage of the act, although it was for the valuable consideration of \$300.00, *Nelson v. John*, 43 Wash. 483, 86 Pac. 933. Act of March 3, 1893 (27 St. 633, c. 209) also Act June 7, 1897 c. 3, s. 1 (30 St. 87 [U. S. Comp. St. 1901, p. 1618]) relating to Indian lands were construed to render valid the sale of an allotment of land of an Indian by the commissioners as trustees after his consent to the sale had been secured, although he died before the sale was made, *Prichard v. Jacobs*, (Wash. 1907) 90 Pac. 922.

Sec. 463. Mexican grants. Construction of certain Mexican grant as to irrigation, see *ante*, §278.

For a case construing a Spanish grant to Colonists of lands now in the state of Louisiana see *Richard v. Perrodin*, 116 La. 440, 40 S. 789. Various Texas Statutes passed while the states belonged to Mexico and their effect upon certain Mexican grants, construed, *City of Victoria v. Victoria County*, (Tex. 1907), 101 S. W. 190. The issuance by the governor of the Mexican State of Tamaulipas after his power to do so had

ceased, of a final title to lands which the Act of Dec. 19, 1836 declared a part of Texas, deprived the grantee of no existing right in the lands, *Haynes v. State*, (Tex. 1907) 100 S. W. 912.

Sec. 464. School lands. Taking of land by eminent domain for school purposes, see *ante*, §119. Kentucky Statutes 1903 sections 3588-3606 authorizing fourth class cities to create boards of education who shall take title to the school property, construed, *School Dist. No. 12 v. Board of Education*, (Ken. 1906) 93 S. W. 590. Texas Laws 1901 p. 294, c. 125 as to abandonment of school lands, construed, *Edwards v. Terrell* (Tex. 1906) 93 S. W. 426. Recent Texas statutes as to school lands construed, *Murphy v. Terrell*; *Weyert v. same*; *Lufkin Land Co. v. same*; *Jones v. same*, (Tex. 1907) 100 S. W. 130, 133, 134, 136. In Illinois the statute of limitations runs against the trustees of a school house lot for the use of a particular School District. The people of the state in general have no interest, in common with the inhabitants of a school district, in the schoolhouse site or the proceeds of it, *Wilkins (J) dissenting*, *Brown v. Trustees of Schools*, 224 Ill. 184, 79 N. E. 579.

Sale. A court under the Arkansas Statutes can set aside a sale of school lands by the collector on account of inadequacy of price, *Williams v. State*, 76 Ark. 290, 88 S. W. 980. Pol. Code, ss. 3398 and 3406, relating to the duties of the surveyor general of the State to file an application for the purchase of school lands, were construed, *Alberger v. Kingsbury*, (Cal. 1907) 91 Pac. 674. The issue of new contracts for the purchase of school lands over which railroads have secured locations is provided by N. D. Laws 1907 Ch. 225. School lands under contract of sale may be divided and new contracts issued, N. D. Laws 1907 Ch. 226. The rights of assignees of purchasers of school lands and of buyers of purchasers' interests are regulated by N. D. Laws 1907 Ch. 227. Fractional sections in fractional townships did not pass to the state of Louisiana under the general grant by Congress of sixteenth sections for school purposes. A sale therefore as school lands was void and the purchaser could not rely upon an estoppel based upon the fact that later the state acquired the title as swamp lands, *Lauve v. Wilson*, 114 La. 699, 38 S. 522. Sales of school lands, defective for failure of the applicant to

file an affidavit of settlement, are made valid by Tex. Laws 1907 Ch. XVIII. See also Tex. Laws 1907 Ch. XX.

Lease and lessee's rights. Laws 1899 c. 69, repealing the Law of 1875 (p. 123), providing for an appraisal of school lands occupied by settlers, requires an appraisal of the land separately from the improvements and gives the settlers opportunity to leave the lands upon that appraisal, *State v. McCright* (Neb. 1906) 108 N. W. 138. The defendant had leased a full quarter section of school lands under the laws of Oklahoma which prohibit any person having any interest in more than one quarter section, and he had procured the plaintiff to lease an adjoining quarter section, as an accommodation to him, but as such an agreement was against public policy it was void, and could not be enforced. *Noel v. Barrett*, 18 Okl. 304, 90 Pac. 12.

Sec. 5 and 6 Ch. 103 Laws 1905, providing for the lease of land belonging to public free school and asylum funds, construed, Tex. Laws 1907 Ch. XX. Texas Laws 1905, p. 163, c. 103, sections 5 and 6 as to leases of school lands, construed, *Garza v. Terrell*, (Tex. 1906) 90 S. W. 1092. Texas Revised Statutes 1895 Articles 4218 F and G as to the classification of public school lands construed together with Texas Laws 1905 p. 159, c. 103 as to leased public lands, and it was held that the latter act did not repeal the former, *Estes v. Terrell*, (Tex. 1906) 92 S. W. 407. A tenant of school lands, if an actual settler, may buy all the land his lease covers, *Patterson v. Knapp*, (Tex. 1907), 103 S. W. 489. The Texas Statute giving a lessee or assignee of a lease of school lands a right to purchase during the lease does not violate the Texas Constitution, *Glasgow v. Terrell*, (Tex. 1907) 102 S. W. 98. Where a lessee of school lands makes a valid purchase of the land before the termination of the lease, the lease is thereby ended without any other cancellation thereof. But when the sale is invalid and the state takes no action to avoid the lease a third person has no absolute right to buy, *Patterson v. Knapp*, (Tex. 1907) 102 S. W. 97.

An applicant to purchase school land agreed to repay A. all the money he advanced to purchase it when she ultimately sold the land, and she also agreed to pay for services in filing the application but this did not invalidate the applicant's right to the land although it was admitted that she purchased as a speculation with the intention of selling at some future time.

Henshall v. Marsh, (Cal. 1907) 90 Pac. 693. For the proceedings necessary for the purchase of school lands and the duties of the commissioners see State ex. rel. Rutledge v. Eaton, (Neb. 1907) 110 N. W. 709. Texas Laws 1905, p. 159, section 3, as to applications to the land office for the purchase of school lands, construed, Flores v. Terrell, (Tex. 1906) 92 S. W. 32. Pol. Code ss. 3495, 3500, were construed not to invalidate an application for school land when the applicant falsely stated that she was a citizen of the United States when she had only applied for naturalization papers, Pardee v. Schanzlin, 3 Cal. App. 597, 86 Pac. 812.

Where an assignment of a right to a school land contract was induced by the promise of an advance of certain sums of money, said assignment to be held as collateral security therefor, and only living expenses, and no further sums were advanced as agreed, the assignment might be cancelled on payment of the money advanced. Norgren v. Jordan, (Wash. 1907) 90 Pac. 597.

Forfeiture. A section of school land was purchased by A in 1885 and as he paid no taxes on it a notice of forfeiture was issued in 1893, and the land was reappraised and sold to B in 1903, but the notice of forfeiture issued by the sheriff was invalid on account of irregularities. The plaintiff, however, was estopped to claim that the proceedings were invalid as he had treated them as valid and the defendant had purchased in reliance on his deceptive silence, Burgess v. Hixon, 75 Kan. 201, 88 Pac. 1076. Texas Statutes as to forfeiture of school lands, construed, Rhea v. Terrell, (Tex. 1907), 103 S. W. 481.

Sec. 465. Swamp and tide lands.

See further §614. Public Acts 1863 Nos. 239 and 1865 No. 65, providing for the appropriation by certain counties of state swamp lands for roads, construed, Robson v. Commissioner of State Land Office, 148 Mich. 12, 111 N. W. 906. Ballinger's Ann. St. & Codes, s. 2155, relating to a valid service of a notice of annual payments due on tide lands, was not construed to make a notice which was returned by the mail undelivered a valid service, and the commissioner had no power to cancel a lease when the rent was paid within 60 days after mailing the second notice, State ex rel Smith v. Ross, 42 Wash. 439, 85 Pac. 29.

Patent. A state patent to "swamp" land does not *per se* prove that title passed to the state under the acts of Congress of 1849 and 1850, known as the "swamp land grants," *Moulierre v. Coco*, 116 La. 845, 41 S. 113. The title of the State of Louisiana to lands granted under the 1841 act of Congress for internal improvements, and as swamp and overflowed lands under the acts of 1849 and 1850, vested in fee simple only upon the identification by the Secretary of the Interior of the lands selected by the State. But where the patentee from the state to lands entered with internal improvement warrants consents to the cancellation of his entries and authorizes the warrants to be delivered to a third person, the purchaser from whom uses them to entry other lands, the title to the lands first entered vests once more in the state and a sale for taxes thereafter will not affect the title so acquired, *Slattery v. Glassell*, 117 La. 550. 42 S. 135. When in 1885 a county made a contract for the digging of a ditch to be paid for in swamp lands at \$1.25 per acre, and in 1893 a new contract was executed extending the time for performance with a stipulation that any person then in actual personal possession of swamp lands, who had made improvements and was then living thereon could buy at \$1.25 per acre, a patent from the county to the assignee of a person who settled on and improved a lot in 1887 was not ordered set aside in a suit by the ditch contractors, *Himmelberger-Luce Land Co. v. Blackman*, 202 Mo. 296, 100 S. W. 1049.

Sale. Sales of state swamp lands in which payment was made in (Civil) war bonds are confirmed by Ark. Acts of 1907, No. 264. The sale of abandoned river channels is authorized and procedure designated by Ia. Laws 1906 Ch. 212. The state land office is authorized to sell, for the benefit of the school fund, all dry lake lands, by La. Acts 1906 No. 185. As "Swamp and Overflowed" lands in Mississippi were never subject to taxation and sale for nonpayment, any assessment and sale of them was without lawful warrant and the buyer took no rights against the state or the purchaser from the state, who bought by lawful warrant at a special sale, *Howell v. Miller*, 88 Miss. 655, 42 S. 129.

Rights of riparian owners. The so-called "Sunk Lands" and "Cut-Off Lake," which is wild and unoccupied and extends to a width of from four to six miles along a navigable stream, the St. Francis River, cannot be acquired by

the owner of contiguous lands by virtue of his riparian rights for fishing and other water purposes. This is because the land is low and swampy, checked by bayous, subject to inundation, and reclaimable, to some extent, for agricultural purposes, *Chapman & Dewey Land Co. v. Bigelow*, 77 Ark. 338, 92 S. W. 534.

Sec. 466. Town-site lands.

Platting of townsite lands, see *ante*, §460. The entry of townsites and transfer of lands so entered to the inhabitants are provided for by Neb. Laws 1907, c. 155. Ohio Rev. St. 1906, section 1377, as to the division of a township and the establishment of a new one, construed, *Cooley v. State*, 74 Ohio St. 252, 78 N. E. 369. Revised Statutes of the United States, Sec. 2387 (U. S. Comp. St. 190 pp. 1457), relating to the right of cities to locate on the public domain with the consent of the territorial legislature by Sess. Laws 1872, p. 16, were construed, and the rights of occupants of lots before the entry was made were protected, and the surveyor had no right to lay out a street through land already occupied, *Scully v. Squier*, (Idaho 1907) 90 Pac. 573.

A deed "reserving the one-half of the gypsum or the profits thereof which may hereafter be found on said land" and in the habendum clause containing the phrase, "the half of gypsum as above described only excepted," created an exception to the grant which left in the grantor a fee simple estate in one-half of the mineral separate from the estate conveyed to the grantee in the surface. Possession by the grantee's successors in title under deeds which were silent as to mining rights and unaccompanied by any actual mining was not adverse to the rights of the owner of the mineral rights, *Gill v. Fletcher*, 74 Ohio St. 295, 78 N. E. 433.

Sec. 467. Lease of public park. A lease from which the city derives a benefit, of part of a city park for a race track is not a diversion from its legitimate use, and shall not be vacated on demand of citizens or taxpayers having no personal or private interest therein, *Bryant v. Logan*, 56 W. Va. 141 49 S. E. 21.

Sec. 468. Alienation of timber-culture claims. Although a timber culture entryman sold his land before obtain-

ing a final patent from the government, the sale was valid under Act of Congress, June 14, 1878, Sec. 2, c. 190, 20 St. 113, *Watkins L. Co., v. Creps*, 72 Kan. 333, 83 Pac. 969.

Death of claimant before patent issues. One who enters public land as a timber culture claimant and to whom no patent issues until after his death acquires no devisable interest, *Walker v. Chresman*, (Neb. 1907) 113 N. W. 218. A timber culture claimant who dies before receiving a patent which is subsequently issued in his name and delivered to his widow transmits no estate to his heirs; they take a fee by grant from the U. S. and under Act Cong. March 3, 1891, c. 561, 26 Stat. 1095 the land is not liable for debts of the original claimant. *Gould v. Tucker*, (S. D. 1905), 105 N. W. 624.

Sec. 469. Grants to railroads—Exemptions. Sec. 3336 B and C's Codes, granting to railroads rights of way over state lands, is amended by Ore. Laws 1907 Ch. 232. The State Board of Land Commissioners is authorized to grant rights of way over state lands for public service companies, highways, and other public and private uses by Id. Laws 1907, Sen. Bill No. 109. Sec. 2 of the Act of July 1, 1862 (12 Stat. 489, c. 120), relating to the right of railroads to a right of way over public lands, was construed not to grant a railroad the right to take lands occupied by a settler under the pre-emption act without compensation, *Union Pac. R. Co. v. Harris*, (Kan. 1907) 91 Pac. 68. When a railroad company had taken proper steps to obtain title to certain alternate sections of government land by patent, and part of such land as shown by the government survey happened to be tide land, all the land remained the property of the railroad, although the patent had not been issued when the state constitution was adopted as it disclaimed by art, 17, §2 all right to land patented by the United States, although the patent was not issued until after the adoption of the State constitution, *Kneeland v. Korter*, 40 Wash. 359, 82 Pac. 608.

If a man has made an entry on public lands under the homestead laws and there is a contest with another entryman, the successful contestant has a right of action for damages against a railroad which appropriates a right of way through the property, and the railroad cannot take the land under the Act of March 3, 1875, 18 Stat. 482 c. 152 which grants a railroad the right to appropriate a right of way through unoccupied

public lands, *Enid v. Anadarko Ry. Co. v. Kephart*, (Okla. 1907) 91 Pac. 1049. The Act of Congress July 26, 1866 (14 St. 289, c. 270), relating to a grant of a right of way for a railroad, was construed to vest the title in the railroad from the time of the grant so subsequent purchasers took with notice and they could not acquire title to the right of way although they held adverse possession of it, *Missouri K. & T. Ry. Co. v. Watson*, 74 Kan. 494, 87 Pac. 687. Right of Way Act of Cong. March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568) with Rev. St. U. S. s. 2322 (U. S. Comp. St. 1901, p. 1425) was construed to allow a locator of a mining claim, which was made prior to the filing and approval of the right of way map showing the definite location of the road, a valid right to his claim although the railroad subsequently included it in the amount allowed it for stations, *Southern Cal. Ry. v. O'Donnel*, 3 Cal. App. 382, 85 Pac. 932. The federal Act of March, 1863, 12 St. 772 c. 98 par. 1, confirmed by a patent from the Governor of Kansas, granted railroads the right to select lands along the line of their road, and the land department of the government purported to withdraw from settlement all lands likely to be selected by the railroad prior to its definite location. This withdrawal was invalid as beyond the power of the department and ineffective as against a homestead claimant who settled on the land after the land was withdrawn from settlement. The claimant's title was superior to the title of grantees of the railroad which had selected his land for indemnity land after he had settled on it when the government grant to the railroad reserved from appropriation all prior homestead entries, *Brandon v. Ard*, 74 Kan. 424, 87 Pac. 366.

Exemptions. The provision of 24 U. S. Stat. 391 c. 120 exempting from the operation of a grant by the United States to the New Orleans Pacific Railway all "lands occupied by actual settlers" covers not only land occupied by those qualified to enter under the U. S. homestead and pre-emption laws, but all land actually settled upon by any person. The United States Land Department had previously handed down several rulings to the contrary, *Lisso v. Devillier*, 118 La. 559, 43 S. 163.

Sec. 470. Grazing rights on public lands.

Grazing rights in general, see further, *post*, §579. Although

the plaintiff owns land in the neighborhood of the public lands, he has no right to bring an action to prevent the exclusion of his cattle from the government lands by the erection of fences on the defendant's lands which circle it in such a way that the plaintiff's cattle cannot pasture on the government lands, as he has no special injury greater than that of any other landowner in the district, *Anthony Wilkinson L. S. Co. v. McIlquam*, 14 Wyo. 209, 83 Pac. 364.

Sec. 471. Authority of land department—Effect of records. Ballinger's Ann. Codes & St. §2198 was construed to allow the Board of Public Land Commissioners to suspend the delivery of a deed to public lands after it has been executed, and they may investigate charges of fraud in the proposed sale of land, *State ex rel Shores v. Ross*, 44 Wash. 246, 87 Pac. 262.

Texas Laws 1901, p. 292, c. 125, requiring the Commissioner of the General Land Office to notify the county clerk of the valuation and classification of land in his county, construed. The question was also passed upon of the admissibility of certain certificates and certified copies from the General Land Office records, *Smithers v. Lowrance*, (Tex., 1906), 93 S. W. 1064.

Sec. 472. Jurisdiction of courts—Conclusiveness of decisions of land department—Conflicting claims. For a discussion of the principles upon which the conflicting claims of settlers upon unsurveyed land and indemnity railroad selections should be settled see *Donohue v. St. Paul, M.&M. Ry. Co.*, 101 Minn. 239, 112 N. W. 413. As between two claimants to public land as a homestead, whose rights have not been determined by the land office, the decision of the state court must be in favor of the one who has been in possession and he will be protected by injunction from interference of the other party until the land court has decided the question of ownership, *Zimmerman v. McCurdy*, (N. D. 1906) 106 N. W. 125.

A State has no interest to maintain a suit to settle a question of ownership of lands between claimants under the timber culture pre-emption or homestead laws, and between the settlers filing on the lands after they were thrown open for entry by the government or the holders of patents under the

swamp land laws, *State v. Warner Valley Stock Co.*, (Ore. 1906) 86 Pac. 780.

Reference by land department to court. Pol. Code s. 3414, 3415, 3416, 3495, were construed to enable a court to determine merely the rights of those parties whose cases have been referred to them by the land department in reference to a contest to land between adverse claimants, and the court cannot pass upon the rights of other intervening claimants whose cases were not referred to the court, *Youle v. Thomas*, 146 Cal. 537, 80 Pac. 714. Pol. Code, s. 3415 under which the surveyor general may make an order which refers a contest in regard to the public lands to the courts, does not allow the plaintiff more than 60 days from the making of the order within which to bring an action, and the 60 days do not run from the time the plaintiff is notified, *Ewbank v. Mikel*, (Cal. 1907) 91 Pac. 672.

Jurisdiction of courts and effect of decisions of land department. Land on the shore of a lake claimed under a deed prior to a patent covering the specific tract will be held to be covered by the patent—the determination of the land department being conclusive, *Barringer v. Davis*, (Ia. 1907) 112 N. W. 208. In an action for possession of land, defendant answered that the land was public, that he had established a residence thereon and that the land office had decided that he was entitled to possession. In a hearing on plaintiff's demurrer to the answer it was *held* that as defendant had not pleaded the issue of a patent to him the state court had no jurisdiction, *Healey v. Forman*, 14 N. D. 449, 105 N. W. 233. Where the land department has adjudicated that a homestead patent may be issued on certain lands, although the defendant claimed it was mineral land, a court has not jurisdiction to consider the matter in the absence of proof of fraud or mistake, *Old Dominion Copper Mining & Smelting Co. v. Haverly*, (Ariz. 1907) 90 Pac. 333. Rev. St. U. S. Sec. 2326 [U. S. Comp. St. 1901, p. 1430] is construed not to give the courts jurisdiction in cases of conflict between adverse claimants to land, when one claims a patent as a mining claim and the other claims a townsite patent, and the matter is final, *Wright v. Town of Hartville*, 13 Wyo 497, 81 Pac. 649.

Upon all questions of fact the findings of the land department are conclusive in the absence of fraud, and a contest will not be considered a second time when the charge has once

been investigated and decided under the rules of the land department. If no proof is offered that the use of the discretion of the land commissioner in refusing to allow a contest to a final entry has been abused the court will not interfere, *Parryman v. Cunningham*, 160 Okl. 94, 82 Pac. 822.

Louisiana has the right to place such conditions as she deems proper in disposing of her own lands and may vest an executive officer with discretion and power to determine, in any given case, when these conditions exist. This officer is the state register and his decisions may be reviewed by the Court upon an appeal brought within six months. Upon such appeal the court has jurisdiction to review all questions, interlocutory or otherwise, raised by the parties during the trial before the register, *Darby v. Emmer*, 118 La. 517, 43 S. 148.

Sec. 473. General statutes. Various Kentucky Statutes as to public lands, construed, *Ware v. Hager*, 31 Ky. Law Rep. 728, 103 S. W. 283. Texas Laws 1901, p. 295, c. 125 section 5 with regard to public lands construed, *Raper v. Terrell* (Tex. 1907), 99 S. W. 93. Texas Rev. St. 1895 article 4218 T and Laws 1905 p. 163, c. 103 with regard to public lands, construed, *Trezerant v. Terrell*, (Tex. 1907) 99 S. W. 94. Texas Laws 1905 p. 162 c. 103 section 4 as to public lands construed, *Suares v. Terrell*, (Tex. 1907) 99 S. W. 541. Texas Laws 1905 p. 159 c. 103 as to public lands construed, *Brown v. Terrell*, (Tex. 1907) 99 S. W. 542. Sections of the Codes relating to management of state lands are amended by Wash. Laws 1907 Ch. 256.

Sec. 474. Land patents—Issue and Effect—Description—Government surveys.

Use of patents in evidence, see *ante* §158.

Issue. The Register of the Land Office is authorized to issue patents where entries were made with scrip by La. Acts 1906 No. 86, and new patents where original patents were issued for scrip by La. Acts 1906. No. 85.

Effect. The issue of a patent by the state will not help the patentee against one claiming title by adverse possession, *Asher v. Howard*, (Ky. 1906) 91 S. W. 270. The title to land granted by the United States to a railroad and subsequently patented by it passes as of the date of the grant; the patent being but evidence of that fact, *Wiese v. U. P. Ry. Co.* (Neb.

1906) 108 N. W. 175. A patent to public lands conveys the legal title to the patentee and can only be revoked by the state because of an irregularity pertaining to its issue, *Smith v. Crandall*, 118 La. 1052, 43 S. 699. The owner of a state certificate of sale of school or swamp land is entitled to possession of the land and its rents and profits and as against all the world except the state, he is to be treated as the owner; when the patent issues it relates back to the sale, *White & Street Townsite Co. v. J. Neils Lumber Co.*, 100 Minn. 16, 110 N. W. 371.

Action by patentee. The person legally entitled to receive a patent may get relief in equity against one who gets a patent from the United States by fraud practised upon the officers of the Land Department, *Smith v. Love*, 49 Fla. 230, 38 S. 376.

Description—Government surveys. A quit claim of all the grantor's interest under a patent from the State of Kentucky in 1853 is of no avail as against a patent issued to the same grantee in 1846. The failure in the 1846 patent to mention or describe prior grants within the boundary does not render it void when the exterior lines are well described, and a surveyor testifies that he found no difficulty in locating them, and that the survey was unusually accurate to cover so large a boundary, *Fox v. Cornett*, (Ky. 1906) 92 S. W. 959. The plaintiff, claiming title under an original government survey, brought an action against the defendant for damages to trees which the defendant claimed to own by a resurvey of the good government land, but the field notes of the resurvey took precedence over the field notes of the original survey, after the subsequent field notes had been duly filed for record, and the defendant held a valid title. For a full discussion see *Kimball v. McKee*, 149 Cal. 435, 96 Pac. 1089. When an island in the Missouri River was surveyed by the U. S. government and in this way appropriated and reserved by it, in 1820, before the admission of the state into the Union, it continued to be the property of the United States until patented to a private individual. A patent issued by the United States government is prima facie evidence at least that all prerequisites of the law necessary to its issuance have been complied with. Field notes of U. S. surveys of public lands will control in ascertaining locations, even although the monuments established by the government cannot be found. While the principal part of the island washed away at its head there were several acres of its

lower end which did not and to this accretions gradually formed so that neither its identity nor the title of the United States therein was lost, *Bradshaw v. Edelen*, 194 Mo. 640, 92 S. W. 691.

QUIETING TITLE

As to quieting title under tax sale, see *post*, §564.

Sec. 475. Who entitled to—Title or possession necessary. When a suit to quiet title is brought and the plaintiff cannot show an absolute title in herself, the suit to establish her title fails. She cannot rely on the weakness of the title of her adversary, *Holderby v. Hagan*, 57 W. Va. 341, 50 S. E. 437. Rev. St. c. 106, §§47, 48 were construed not to permit one who had conveyed his estate or had gone into bankruptcy to maintain an action, *Allen v. Foss*, (Me. 1906) 66 Atl. 379.

A mortgagee fraudulently cancelled a mortgage on record in order to further a fraudulent scheme; but when his plan has failed a court of equity will not grant him relief as it would one who had cancelled the mortgage innocently and by mistake, *Nugent v. Stofella*, (Ariz. 1906) 84 Pac. 910. There was no error in sustaining a demurrer to a plaintiff's equitable petition to remove a cloud on the title to realty, where it did not appear that either the plaintiff or any of the defendants were in possession of the lands, or that the plaintiff's title thereto was perfect; neither did the plaintiff aver that he was the true owner of the premises in dispute, *McMullin v. Cooper*, (Ga. 1906) 54 S. E. 97. A bill to set aside a deed as a cloud on title which alleges that at the time of its execution the plaintiff, the grantor, was an ignorant, illiterate old woman nearly 80 years old and was induced to convey without understanding the nature and character of her act and without consideration, and that at the time of filing the bill she was in possession sets out a good cause of action, *Shiff & Son v. Andress*, 147 Ala. 690, 40 S. 824. A bill to quiet title which alleged that the plaintiff, the grantee in an executed and delivered deed although unrecorded, caused her name to be erased as grantee with the consent of the grantor and substituted therein that of her granddaughter, the defendant, who was not a party to the

conveyance, paid no consideration and to whom no delivery was ever made, but now had changed her mind and did not desire to make a gift to her granddaughter, stated a good cause of action, *Gibbs v. Potter*, 166 Ind. 471, 77 N. E. 942.

Possession necessary. Persons who have acquired title by adverse possession are entitled to have it quieted and a sheriff's deed which was a cloud thereon, cancelled, although they were not parties to it, *Williams v. Hays*, (Ky. 1906) 93 S. W. 1063. Where the plaintiff in a bill to quiet title proves peaceable possession he makes out a prima facie case and throws upon the defendant the burden of proving title, *Kendrick v. Colyar*, 143 Ala. 597, 42 S. 110. A person not in possession cannot maintain a bill to remove a cloud on title, *Drum & Ezekiel v. Bryan*, 145 Ala. 686, 40 S. 131. The possession contemplated by Alabama Code 1896, section 809 as entitling the holder to maintain a bill to quiet title must be peaceable and undisputed, rather than scrambling, *Foy v. Barr*, 145 Ala. 244, 39 S. 578. A bill on behalf of all stockholders brought by one which alleges that the corporation owned land and for several years had ceased to do business abandoning its organization, but certain parties claimed therein some interest inferior to the corporation, and prayed for a quieting of the title and a sale, was without equity as the complainant did not appear to be in possession, *Merritt v. Alabama Pyrites Co.*, 145 Ala. 252, 39 S. 555. A bill to quiet title under Mississippi Code 1892, section 499, will not lie where there is no allegation that the complainant is in possession and which concludes with a prayer for a writ of possession which by implication shows that the defendant is in adverse possession, *Gambiell Lumber Co. v. Saratoga*, 87 Miss. 773, 40 S. 485. To maintain a bill for the removal of a cloud upon title the complainant must allege and prove title in himself and that the premises were in his possession or vacant and unoccupied, *Glos v. Kenealy*, 220 Ill. 540, 77 N. E. 146. Where an old fence around certain lots had been allowed to fall down and the public were using the lots as a passage way, and the owner never had in any way used or occupied them, they were properly regarded as unoccupied within the meaning of the word as applicable to proceedings to quiet title, *Glos v. Ptacek*, 226 Ill. 188, 80 N. E. 727. Where one is not in possession and has only an equitable title to land, a bill to quiet title cannot be maintained against one

in possession through a tax title, with no privity in title or right existing between the claimants. The legal title must first be acquired and then ejectment be brought, *Glenn v. West*, 103 Va. 521, 49 S. E. 671.

The holder of a record title to wild unenclosed lands may maintain a bill under P. L. 1901, pp. 57, 58, to quiet her title as against the defendant who put up stakes along the boundary line and built a slab shed and cut timber on the property, as these acts did not constitute notice of possession as timber cutting was a very common trespass, and the stakes might be taken to indicate ownership of the land on the other side of the boundary line, and the unoccupied slab shed was notice of nothing except of abandonment, and therefore the defendant had no rights in the property by adverse possession, *McGrath v. Norcross*, 70 N. J. Eq. 364, 61 Atl. 727. Alabama Code 1896, section 809-814, authorizing one "in peaceable possession of land" to sue to quiet title is not applicable to constructive possessors of wild and wooded lands who sue a grantee of a purchaser at a tax sale where the defendant had paid taxes thereon, kept off trespassers, cut tanbark thereon, posted notices warning against trespass, and objected to persons cutting cross ties on it, *Randle v. Daughdrill*, 142 Ala. 490, 39 S. 162.

Evidence of possession. In a suit to quiet title a void tax deed is not admissible without evidence of actual possession thereunder, *Southern Ry. Co. v. Hall*, 145 Ala. 224, 41 S. 135. Evidence that a mother bought a house and lot as a home for her son during his life and that he took possession and made improvements will sustain an action by the son to quiet his title, *Merriman v. Merriman*, (Neb. 1905) 106 N. W. 174.

Various titles. Under Mississippi Code 1892, section 500 a person to maintain a bill to remove clouds upon title must hold the legal or equitable title, *Jones v. Rogers*, 85 Miss. 802, 38 S. 742. Louisiana Act. No. 101, p. 127, of 1898 which allows a tax purchaser to quiet his title by suing the real party or parties in interest, construed, *Slattery v. Kellum*, 114 La. 282, 38 S. 170. One who holds an assessment certificate may not have a judgment quieting title against one who has the patent title, *Coffman v. London & Northwest American Mortg. Co.*, 98 Minn. 416, 108 N. W. 840. Under Sec. 57 and 59 c. 73 Comp. St. 1903 a remainder man may bring an

action to quiet title during the life of the life tenant, *Hobson v. Huxtable*, (Neb. 1907) 112 N. W. 658. The receiver of an estate of a deceased has no title to file a bill to remove a cloud on title, the heirs and devisees being the necessary parties. The cause was therefore remanded for proper parties, *Gibson v. Tuttle*, (Fla. 1907) 43 S. 310.

A holder of a bond conditioned to make a good title to certain land upon payment of the purchase price is not the equitable owner entitled to bring a bill to remove a cloud on title, unless he has paid the purchase money, *Bradley v. Bell*, 142 Ala. 382, 38 S. 759. The purchaser of a farm fell behind in his payments and when he was a year behind he surrendered the premises after receiving a notice to quit from the vendor, although subsequently he offered \$1,000 less than was due on the property. Under these circumstances the vendor was entitled to have the contract of sale vacated and his title declared to be free from any cloud by reason of the contract, *Whiteford v. Yellott*, 104 Md. 191, 64 Atl. 936. In the absence of provisions in a contract for the sale of land that time shall be of the essence thereof and that failure to pay shall cause a forfeiture the vendor has no right to have his title quieted after breach by the vendee and notice by the vendor that after 30 days he would claim a cancellation of the contract, *Cody v. Wiltse*, 130 Ia. 139, 106 N. W. 510.

A tenant cannot rely upon his possession under the lease in his bill against the landlord to quiet the tenant's claim of title, *Engle v. Tennis Coal Co.*, 30 Ky. Law Rep. 1269, 101 S. W. 309. In an action to quiet title it appeared that plaintiff's title rested upon a void tax judgment and he claimed the right to maintain the action by virtue of an attornment to him by a tenant of one of the defendants who claimed title to the land in suit by adverse possession. Held—this attornment was of no value to plaintiff, *Trimble v. Lake Superior & Puget Sound Co.*, 99 Minn. 11, 102 N. W. 867. Under Gen. St. 1902 s. 4053 an action may be brought by a person claiming title to land against anyone who has any interest in it, any estate, or any lien on the land, to remove any ground for dispute concerning the title; but the plaintiff who had held possession of the land could not bring an action under this act to recover possession when the defendants entered on the land and built a boat house thereon and continued to occupy the land, as the plaintiff's interest was only the right to lease it and enjoy the

rents and profits from it under the will of her husband and such a suit to quiet title could not be maintained in a court of equity, *Foot v. Brown*, 78 Conn. 369, 62 Atl. 667. The Act of April 16th, 1903 (P. L. 212; 2 *Purd.* [13th Edition] 1304), relating to the interest required of a plaintiff bringing a suit to quiet title, was construed in, *Heppenstall v. Leng*, (Pa. 1907) 66 Atl. 991. For a case concerning quieting title to real estate see *Gwinner v. Michael*, 103 Va. 268, 48 S. E. 895.

Sec. 476. What constitutes a cloud. A bill to remove a cloud on title does not lie against a defendant who is alleged to be in possession of certain lands, to have leased others and to be otherwise trying to control them, *Barco v. Doyle*, 50 Fla. 488, 39 S. 103. A conveyance of land executed by a stranger to the title, or the judgment of a court rendered in a suit between strangers to the title, cannot affect the true owner, and casts no cloud upon his title, *Haggart v. Chapman-Dewey Land Co.*, 77 Ark. 527, 92 S. W. 792. A bill in equity which alleges that certain statutes extending the corporate limits of a city are unconstitutional and prays for an injunction against a sale of land so added for city taxes is without equity. Such a sale would not create a cloud upon the title to the land sold, *City of Ensley v. McWilliams*, 145 Ala. 159, 41 S. 296.

Sec. 477. Actions—Parties—Pleading—Burden of Proof—Lapse of time. Rev. Code Civ. Proc. Sec. 127 and 681, relative to counterclaims in actions to quiet title, construed, *Danielson v. Rua*, (S. D. 1906) 107 N. W. 680. Defendants in ejectment cannot base a bill to quiet title and to enjoin the ejectment suit upon matters which are a defense to such action, *Murray v. Barnes*, 146 Ala. 688, 40 S. 348. Missouri Revised Statutes 1899, section 650 as to suits to quiet title construed with section 3094 as to the admissibility in evidence of entries upon the books of the U. S. Land Office, *Stewart v. Lead Belt Land Co.*, 200 Mo. 281, 98 S. W. 767.

Parties. To a bill to remove a cloud on title and have a conveyance canceled as fraudulent the persons who executed it are necessary parties, *Florida L. R. Phosphate Co. v. Anderson*, 50 Fla. 501 & 516, 39 S. 392. In an action to quiet title to school lands, a county auditor and board of commissioners were neither necessary nor proper defendants, and a judgment

against them could not bind the State, *State v. Wimer*, 166 Ind. 530 77 N. E. 1078. When after a trial in a suit to quiet title a person's request to be made a party defendant was granted but he filed no pleading and no issue was tendered him, no decree could be rendered against him, *Powell v. Crow*, 204 Mo. 481, 102 S. W. 1024. A bill to determine adverse claims in land which avers that the defendant had no title because his deed was executed while the plaintiff was in adverse possession thereof, which does not join the defendant's grantor is demurrable for nonjoinder of necessary parties, *Davis v. Denham*, 145 Ala. 247, 40 S. 277. Sec. 95, Code Civ. Proc., does not require that a mortgagee be made a party to an action to quiet title brought by one claiming under a conveyance from the owner of the fee against one claiming under a tax deed, *Grigsby v. Wolven*, (S. D. 1906) 108 N. W. 250.

Pleading. An averment in a bill to quiet title that the complainant is a fee simple owner of the particular described land, subject to an oil and gas lease, is sufficient to describe his interest, *Erie Crawford Oil Co. v. Weeks*, (Ind. 1907) 81 N. E. 518. Under Alabama Code 1896 section 809 and 811 providing for a bill to quiet title by one in peaceable possession a plea to a bill is not allowable, *Kinney v. Steiner Bros.*, (Ala. 1907) 43 S. 25. A bill to quiet title to coal and other minerals under land can be maintained under Alabama Code 1896, section 809. An amendment thereto seeking to estop the respondent from showing that a deed to one under whom the complainant claimed was never delivered did not constitute a departure, *Gulf Coal & Coke Co. v. Alabama Coal & Coke Co.*, 145 Ala. 228, 40 S. 397. In an action to quiet title under section 1082, Burns' Ann. Indiana St. 1901, against "one who has title to or interest in real property" one who is brought into court to answer as to his interest must set forth all the interest he then claims, or if he fails to do so, his claim, whatever its character, is barred, *Chicago & S. E. Ry. Co. v. Grantham*, 165 Ind. 279, 75 N. E. 265. Mississippi Rev. Code 1892, section 501, providing that the complainant in a bill to quiet title shall deraign his title in the complaint, construed, *Jackson v. Port Gibson Bank*, 85 Miss. 645, 38 S. 35.

Burden of proof. Where the testator's wife and sole devisee filed a suit to remove a cloud on title consisting of an alleged mortgage to secure a note for \$2,000, it was held that she had the burden of showing that the note was without

consideration, or procured by undue influence or upon an illicit consideration, *Robertson v. Sebastian*, (Ky. 1907) 99 S. W. 933. In an action to quiet title and set aside a grant from the State as a cloud on the title, where the plaintiff relied on a grant from the board of education under power of Rev. Code. c. 66, Const. Art. 19, s. 10, and code 2506, giving swamp lands to the state board of education, the burden of proof is on the plaintiff to prove that they are swamp lands, *State Board of Education v. Makely*, 139 N. C. 31, 51 S. E. 784.

Lapse of time. In an action to quiet title it was held that on the evidence the defendant's claim was stale and unenforceable, *Begley v. Dixon*, 31 Ky. Law Rep. 196, 101 S. W. 963. A plaintiff in a suit to quiet title, who had paid no taxes on the land for 30 years and apparently abandoned all claim thereto, was barred by laches when in the meantime the defendant who bought at a tax sale had invested considerable amounts of money in the land, which was constantly increasing in value, and had paid the taxes, *Osceola Land Co. v. Henderson*, 81 Ark. 432, 100 S. W. 896. It was held that payment of taxes upon wild lands for five years by a claimant under a void tax sale, even with a great increase in the value of the land, does not justify a court of equity in depriving the true owner, upon the theory of laches, from his right to have his title quieted, *Earle Improvement Co. v. Chatfield*, 81 Ark. 296, 99 S. W. 84.

Sec. 478. Jurisdiction. A Court of equity has jurisdiction for the purpose of quieting title to enjoin the sheriff from selling as public school land real estate which the plaintiffs own in fee, *Bonsor v. Madison County*, 204 Mo. 84, 102 S. W. 494. In Massachusetts a bill to quiet title still remains within the general equity jurisdiction of the Superior Court and the Supreme Judicial court, not having been transferred to the Land Court, *First Congregational Society v. Metcalf*, 193 Mass. 288, 79 N. E. 343. Where in proceedings to quiet title, other persons than the original parties file pleadings and ask that their title to the same lands be quieted, equity has jurisdiction to determine the whole controversy, *Gaither v. Gage*, 82 Ark. 51, 100 S. W. 80. A complaint which alleges that the plaintiff is in possession of land, sets up title, and asks to have the same quieted gives the chancery court jurisdiction,

Earle Improvement Co. v. Chatfield, 81 Ark. 296, 99 S. W. 84. It was held that where the defendant's answer to a bill in equity set up a tax title and possession thereunder, and asked to have the same quieted a court of equity properly acquired jurisdiction even if the plaintiff's bill failed to "state a cause of action cognizable in equity," Burns v. McBeasley, 81 Ark. 163, 98 S. W. 977.

When in Kentucky in an action to quiet title where adjoining owners overlap, a surveyor's report has been filed and the cause submitted, the court cannot, without taking any action for a year, dismiss the case for want of prosecution. The report is prima facie evidence of its correctness, Bates v. Baker, 31 Ky. Law Rep. 47, 100 S. W. 340.

Sec. 479. Statutes. Sec. 809 of the code of 1896 providing that a person in possession of and claiming lands may file a bill to clear title is amended by Ala. Laws of 1907, No. 632.

Various Arkansas Statutes as to bills in equity to quiet title, construed, Lawyer v. Carpenter, 80 Ark. 411, 97 S. W. 662.

The proceedings requisite to quiet title when public records have been lost or destroyed are prescribed in detail by Cal. Stat. 1906 Ch. 59. The making and "recordation" of notice of ownership for claim to real property when records are lost are provided for by Cal. Stat. 1907 Ch. 517. Supplementary to Stat. 1906, Ch. 59.

Kentucky Statutes 1903 section 11 as to suits to quiet title construed and held not applicable to a suit by the owner of mineral rights praying for the cancellation of an alleged outstanding fraudulent deed purporting to convey them to a third party, Eversole v. Virginia Iron Co., (Ky. 1906) 92 S. W. 593.

Rev. Stat. Ch. 106 Sec. 47 and 48 prescribing in detail the proceedings necessary to quiet title to real estate are amended by Me. Laws 1907 Ch. 62 and 150.

Comp. Laws Sec. 448, relative to suits to quiet title, construed, Tinker v. Piper, (Mich. 1907) 112 N. W. 913.

Mississippi Laws 1888, p. 40, c. 23, as to quieting title to lands in the Yazoo Delta, construed, Means v. Haley, 86 Miss. 557, 38 S. 506.

Missouri Revised Statutes 1899 section 650 as to suits

to quiet title construed, *Harrison Machine Works v. Bowers*, 200 Mo. 219, 98 S. W. 770. Missouri Revised Statutes 1899 section 4268 being a statute of limitations construed together with section 650 of the same statutes which authorizes a suit to quiet title to land, *Haarstick v. Gabriel*, 200 Mo. 237, 98 S. W. 760. Missouri Rev. St. 1899, section 650, as to suits to quiet title construed in connection with section 672 as to jeofails, *Dixon v. Hunter*, 204 Mo. 382, 102 S. W. 970.

Rev. St. 1898 Sec. 3186, authorizing actions to test the validity of claims on land, construed, *Coe v. Rockman*, 126 Wis. 515, 106 N. W. 290.

RAILROADS

Adverse possession over, see *ante* §21.

Grants of public lands to railroads, see *ante* §469.

Right to take by eminent domain, see *ante* §119, 121, 122,

Taking of railroad lands by eminent domain, see *ante*

§121.

Railroads as public use, see *ante* §122.

Damages on taking for railroad right of way, see *ante*

§134.

Liability to fence, see *ante* §§179, 180.

Liability for starting fires, see *ante* §§183-186.

Liability for obstruction of waters, see *post* §627.

Diversion of surface water by railroad embankment,
see *post* §632.

Railroad in street, see *ante* §§224-226.

Exempt from taxation, see *post* §527.

Taxation of, see *post* §538.

Sec. 480. Location—Change of location—Illegal agreement to locate—Homesteader's rights. The acquisition of railroad rights of way over lands of infants and deceased persons is provided for by N. D. Laws 1907 Ch. 204. *Burn's Indiana Ann. St. 1901*, section 5153 authorizing railroads to build roads across streams is not applicable to a drainage ditch fed by no spring or water course, *New Jersey, I. & I. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420.

The term "private way" in Comp. Laws 1897 Sec. 6234 par. 5, providing that no railway shall be constructed upon any public street, private way, etc., until compensation be made to the owners of property adjoining, means any private way however created, *Detroit Leather Speciality Co. v. Michigan Cent. R. Co.*, (Mich. 1907), 113 N. W. 14.

Priorities. A railroad company cannot acquire a right of way by making a survey midway of its proposed line in competition with the party of a rival company which is acting in good faith and of which it has full notice even though its map of location is filed first, *Cumberland R. Co. v. Pine Mountain R. Co.*, (Ky. 1905) 96 S. W. 199. Where two railroads claim a location priority gives a superior right, and a railroad owning land may be compelled to surrender it to another railroad which held a prior location, and a meeting of the directors of the road authorizing it to be located on the most practical route as shown by the maps and profiles filed as required by law and directing the necessary filings to be made as fast as the same may be prepared, constitute a valid location, *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641, 50 S. E. 890. A railroad company holding a charter to build street railroads adopted a certain location by a vote of the directors, and had it staked out and began to purchase the easement from the property owners. Afterwards another railroad holding a general charter bought a few deeds to this right of way from the property owners and adopted the location, but the railroad making the prior location held the valid claim to the right of way, *Fayetteville St. Ry. v. Aberdeen R. R. Co.*, 142 N. C. 423, 55 S. E. 345.

Change of location. Although Revisal 1905 s. 2573 prohibits a change in route of a railroad in a city without the sanction of the board of aldermen, such a change can be made with the approval of the corporation commission under its authority from the legislature, *Dewey v. Atlantic Coast Line*, 142 N. C. 392, 55 S. E. 292. The secretary of the interior has jurisdiction to determine the rights of conflicting railroad locations made under Act Cong. March 3, 1875, c. 152, 18 Stat. 482, (U. S. Comp. St. 1901, p. 1568) and a railroad may file an application for a change in location without filing an absolute surrender of the old location, but the surrender may be conditional on the approval of the change in location, especially when the other railroad has not been deceived by it

but has had at all times complete knowledge of all the facts and it did not obtain any intervening rights, *Phoenix & E. R. Co., v. Ariz. E. R. Co.*, (Ariz. 1906) 84 Pac. 1097.

Width. If there is nothing concerning the width of a right of way required by a railroad in proceedings for damages by either side, then it is presumed that the right of way is the width fixed in the charter of the railway company, *Beal v. Durham & C. R. Co.*, 136 N. C. 298, 48 S. E. 674. The easement was presumed to be fifty feet wide in *Seaboard Air Line R. Co. v. Olive*, 142 N. C. 257, 55 S. E. 263. Where there has been no taking of a railroad location other than the mere occupation of the strip necessary for the road bed the road is liable for trespass if it digs a ditch on land outside of that occupied by it even though it be within the limits of the land which it had authority to take, *Louisville & N. R. Co. v. Smith*, 141 Ala. 335, 37 So. 490.

Parallel lines. Section 166 of the present Constitution [Va. Code 1904 p. cclxi] gives the legislature the right to prevent by statute every railroad company in the state from paralleling, intersecting, crossing, &c. the line of the Richmond F. & P. R. Co. Pursuant to section 166 of the Constitution was enacted section 12 of sub. 2 concerning corporations, which provides that no railroad should have power to build any railroad parallel to the line of the Richmond, Fredericksburg and Potomac Railroad. Where a proposed railroad line runs only a short distance in the same direction and does not interfere with the R. F. and P. R. R. this act is not applicable, *Wheelwright v. Commonwealth*, 103 Va. 512, 49 S. E. 647.

Agreement to locate illegal. Where a station was built near a hotel under a contract with the hotel proprietor, the consideration promised by the proprietor could not be collected as it was not public policy to give the railroads an opportunity to exact tribute for locating a station where the needs of the public demanded it, *Enid R. of W. & T. Co. v. Lile*, 15 Okl. 317, 82 Pac. 810.

Homesteaders' rights. U. S. Comp. St. 1901 p. 1568, granting rights of way for railroads over public lands, does not give rights superior to those acquired by homesteaders if such have accrued before the work of construction begins, *Doughty v. Minneapolis St. P. & Ry.*, (N. D. 1906) 107 N. W. 971. The Act of Congress March 3, 1875 c. 152, 18 Stat. 482, [U. S. Comp. St. 1901, p. 1568] was construed as granting a settler

a right to an action for possession of the right of way occupied by the railroad to compel the payment of damages, and limitations did not run against him until after acquiring his patent, *Slaght v. Northern Pac. Ry. Co.*, 39 Wash. 576, 81 Pac. 1062.

Sec. 481. Crossing of railroads and ways—Farm crossings. When a deed to a railroad reserved a right of way over the track and later the railroad raised the track several feet making a crossing impossible the grantor is entitled to damages for loss in value of his land caused by the elevation, *Chesapeake & O. Ry. Co. v. Richardson*, (Ky. 1907) 98 S. W. 1042. When a proposed spur track is intended for the transfer of freight in car load lots from several industrial plants in a municipality its use is open to the public and necessary crossings therefor may be expropriated, over the spur tracks of another railroad, *Kansas City &c. Ry. Co. v. Louisiana W. R. Co.*, 116 La. 178, 40 S. 627.

Where a railroad obtained a right of way upon condition that it would make necessary passageways and the agreement was performed and recognized for over 50 years, it would be specifically enforced against a railroad which later bought the right of way at foreclosure and attempted to fill up the passageway, *Baltimore & O. S. W. R. Co. v. Brubaker*, 217 Ill. 462, 75 N. E. 523. When a railroad covenants to provide the grantor in a deed with a suitable and convenient road crossing the track of the railway, the right of the grantor to use the crossing was not limited to its use for agricultural purposes, but it could be used as a road to houses across the railroad track, and when the railroad raised its track so the crossing was closed, the grantor was entitled to damages proportionate to the present and prospective use of the crossing to him, *Speer v. Erie R. Co.*, 70 N. J. Eq. 318, 62 Atl. 943. When in condemnation proceedings the following order was entered on the record books of the county court: "Proposition for crossing. The plaintiffs—propose to make, construct, and maintain one good and sufficient undercrossing of its railroad from one side to the other suitable for the crossing of—wagons—and this proposition shall be made a part of the judgment that may be entered in this action," and judgment was entered for \$2,000, it was held that this proposition was in effect a contract by the railroad to build the crossing. The

cause of action for its breach was held by the owners of the land, *Louisville Ry. Co. v. Sale*, (Ky. 1906) 93 S. W. 613.

Farm crossings. Where a railroad, the grantee in a deed of land for its right of way, covenanted "to provide four suitable farm crossings at places to be designated by" the grantor it cannot after a certain crossing has been used for many years abolish it upon the ground that it has ceased to be used as a farm crossing, *Kraeer v. Penn. Ry. Co.*, (Penn. 1907) 67 Atl. 871. A farmer obtained a right from the railroad to cross from one part of his land to another, and he used for 30 years a narrow farm crossing 12 feet wide with sliding bars. When the crossing was discontinued he had no right to damages for the loss of any greater right than the privilege of using it as a farm crossing and he had no right to maintain that it was a public street, *Speer v. Erie R. Co.*, (N. J. Err. & App. 1907) 65 Atl. 1024. Although Ohio Rev. St. 1892, sections 3327 and following only require a railroad to build farm crossings for owners whose lands lie upon both sides of its track when constructed, any owner who later gets title to land on both sides may build such a crossing at his own expense if constructed and maintained without interfering with the operation of trains, *Gratz v. Lake Erie & C. Ry. Co.*, 76 Ohio 230, 81 N. E. 239. When in a deed to a railroad for a right of way the owners of the fee by implication reserved the right of passway for the use of their farm and the railroad covenanted expressly to construct the necessary farm crossings, a suit by the owners against the railroad for failure to put in such crossings and the recovery of a judgment and satisfaction thereof did not preclude them from bringing a new suit for damages due to the fact that the railroad prevented the owners from building a passway. The measure of damages in the first suit was, not the value of the passway so withheld, but such sum as would enable the owners of the land to themselves put in the crossings, and such additional sum as would compensate them for damages sustained for having been deprived of their use from the time they were required to be put in up until the trial, *Wilson v. Ill. Cent. R. R. Co.*, (Ky. 1906) 92 S. W. 602.

Sec. 482. Crossing of two railroads. If a reasonable time has not expired after the filing of a location for a railroad and its actual construction, a court may interfere by in-

junction if another railroad threatens to build a parallel line crossing and recrossing the plaintiff's tracks not at right angles so as to injure the value of the location, *Arizona & C. R. Co. v. Denver R. G. R. Co.*, (N. M. 1906) 84 Pac. 1018. Where a steam railroad constructed a crossing over a right of way held in fee and the public used it for several years the railroad cannot then enjoin a street railway from using the crossing as no such limited dedication can be shown, *Michigan Cent. R. Co. v. Hammond, etc., Elec. Ry. Co.*, (Ind. App. 1908) 83 N. E. 650.

A railroad has a right to cross an electric railway under the act of March 10, 1886, and chapter 52 of the code, and the exact point and manner of the crossing may be determined by a decree in equity, if the parties cannot come to any agreement. Section 11 of chapter 52 of the code does not prohibit grade crossings when only the ordinary unavoidable delays and necessary hindrances will be caused, *Wellsburg & S. L. R. C. v. Panhandle Traction Co.*, 56 W. Va. 18, 48 S. E. 746.

Sec. 483. Loss or abandonment of rights—By adverse possession—Conveyance. For action in regard to the forfeiture of a street railway license for nonperformance of covenants see, *Wheeling & E. G. R. Co. v. Town of Triadelphia*, 58 W. Va. 487, 52 S. E. 499. In a grant of a right of way conditional on the building of a railroad by a certain specified time, the right to locate a railway there was lost after the expiration of the time agreed on, *Peterson v. Atlantic and B. R. Co.*, 120 Ga. 967, 48 S. E. 372. A grant to a railroad "of exclusive rights of way for tramroads or iron railroads over and across all that tract of land" for 25 years, with a provision that the lease might be extended indefinitely on the payment of \$5.00 per year, and containing a general warranty, showed that it was not intended that the lease should be revoked at the will of the grantor, *D. W. Alderman & Sons Co. v. Wilson*, 71 S. C. 64, 50 S. E. 643. Under Sec. 2015 of the code, providing that after 8 years of non-use the right of way of a railroad shall "revert to the owner of the land from which said right of way was taken," a disused right of way, conveyed by a deed providing that if the premises were not used for railroad purposes they should revert to the grantor, reverts to the grantor and his heirs and does not pass by deed

to the purchaser of the adjoining land, *Spencer v. Wabash R. Co.*, 132 Ia. 129, 109 N. W. 453.

When the railroad company claiming a right of way is so negligent in ascertaining its rights, that an attempt to enforce them should be regarded as a wanton invasion of the possession of the owner, punitive damages may be rightfully assessed, *Beaudrot v. Southern Ry. Co.*, 69 S. C. 160, 48 S. E. 106.

Notice of unrecorded conditions. An electric railroad obtained a grant of a right of way from property owners on the condition that if the company did not operate its rights of way after the road was built that the track and fixtures should revert to the property owners along the right of way after the company had failed to operate the road for thirty days after receiving written notice that the property owners would claim a forfeiture. The agreement was verbal with some of the property owners, and with the others was unrecorded when it was written, therefore it did not charge a mortgagee with notice and although the property owners had taken up the rails, etc., and shipped them to a distant point by a railroad, the company was liable in an action of trover against it by the mortgagee when demand was made to the railroad company for the rails while they were still in its possession, although the company delivered them to the original consignees, *Georgia R. & B. Banking Co. v. Haas*, 127 Ga. 187, 56 S. E. 313.

Adverse possession. When a railroad acquires an easement over land that easement is presumed to be 50 feet on each side of the centre of the tracks, and adverse possession of a part included in this easement will not convey title. *Revisal* 1905, 388. For a full discussion see *Seaboard Air Line R. Co. v. Olive*, 142 N. C. 257, 55 S. E. 263.

Abandonment enjoined. Although a railroad company had torn up part of its tracks, an injunction might be issued, pending the trial of the case in full which would prevent the company's tearing up the rest of its right of way, *Brown v. Atlantic & B. Ry. Co.*, 126 Ga. 248, 55 S. E. 24.

Conveyance. When a railroad purchased a strip of land under a warranty deed for a right of way described as "all the lands lying within 50 feet of the centre of the railroad," a purchaser from the railroad acquired no interest in it when he

did not purchase it for railroad purposes, *Abercrombie v. Simmons*, 71 Kan. 538, 81 Pac. 208.

Sec. 484. Regulation of rights—Equitable relief—Drainage.

Regulation. For a consideration of the facts controlling the right of a railroad company to contract for the location and the maintenance of stations under restrictions of the public as to times and places for the stoppage of trains, see *Butler v. Tifton, T. & G. Ry. Co.*, 121 Ga. 817, 49 S. E. 763. Under *Hurd's Illinois Rev. St.* 1903, p. 291, c. 24, section 62, a city council may not compel a railroad to elevate its tracks by means of a permanent obstruction of certain streets except by a three fourths majority vote, *People v. Atchison, T. & S. Ry. Co.*, 217 Ill. 594, 75 N. E. 573. Where a railroad company had been granted a right of way on a city street, the city ordinance limiting the speed of trains, prohibiting the unreasonable obstruction of the street, its use as a depot or for any purpose that would interfere with the rights of the rest of the public was enforceable, *Atlantic & B. Ry. Co. v. Mayor, &c., of City of Montezuma*, 122 Ga. 1, 49 S. E. 738. The corporation commission required a railroad company to construct a private switch, the order was confirmed by the circuit court as a reasonable one, and although there may be greater danger in operating the road the judgment will stand, *North Carolina Corp. Commission v. Seaboard Air Line Ry. Co.*, 140 N. C. 239, 52 S. E. 941.

Equitable relief. A defendant was in possession of a railroad depot and tract of land the title to which was in dispute. It was error for the court to enter a final decree permanently enjoining the defendant from interfering with or interrupting the plaintiff in the full and free enjoyment of the use and possession of the premises * * * and with right (given to plaintiff) to remove obstructions now or hereafter placed on said premises by the defendant, before the question of title was adjudicated, *Beacham v. Wrightsville & T. R. Co.*, 125 Ga. 362, 54 S. E. 157. A railroad company obtained a grant of a right of way from three of the heirs to an estate paying \$500.00 in cash and agreeing to pay \$1,500.00 balance, and built a railroad on the property believing that it had acquired a good title to the right of way. Although agreements were incorporated in the deed to the right of way for

the right to construct switches to run to manufactories, the heirs had no right to build them to connect with a coal mine. Two of the heirs were estopped by their silence from protesting against the grant of the right of way and its terms, but one was not estopped as he was not at home and knew nothing about it, and another one was an infant. Since all the heirs petitioned for an injunction against the operation of the railroad at all, and the real cause of the suit was the damage to the land caused by the inability of the heirs to market their coal conveniently by switches connecting with the railroad, the court dismissed the injunction on condition that the switches were to be constructed which the railroad expressed itself willing to do, thus protecting the rights of the two heirs who were not barred by signing the agreement or by laches, from irreparable injury, which would not result according to their own evidence if the switches were constructed to connect with their coal mines, *McClane v. McClane*, 213 Pa. 286, 62 Atl. 861.

Drainage. The locating of drainage ditches across railroad rights of way is regulated by Ia. Laws 1907, Ch. 95. A railroad which has acquired a right of way over land by more than two years use, acquires also the right to drain off the surface water, provided it uses all reasonable care in constructing the drains, *Parks v. Southern Ry. Co.*, 143 N. C. 289, 55 S. E. 701. A coal company under a grant of a right of way for a railway line connecting its mine with a railroad has no right to divert the surface water from its natural flow or to obstruct or poison the channel of a creek on adjoining land by allowing slack to be deposited along its right of way where it would naturally wash into the creek, *Crabtree Coal Mine Co. v. Hamby's Admr.*, (Ky. 1906) 90 S. W. 226. If a railroad owning a canal allows stagnant water to accumulate so as to cause malaria it is liable for damages unless the plaintiff is negligent and allows equally as bad conditions to exist on his own premises, *Chesapeake & Ohio Ry. Co. v. Whitlow*, 104 Va. 90, 51 S. E. 182.

REAL ACTIONS

See ACTIONS—EJECTMENT.

REAL ESTATE AGENTS

See BROKERS.

RECORDS AND RECORDING

Simultaneous recording of two mortgages, see *ante*, §378.
Notice by, see further *ante*, NOTICE.

Sec. 485. Attestation—Use as evidence—Time—Ancient deed—Access to and destruction of records. Kentucky St. 1903, ss 501-503 and ff as amended by acts 1904, p. 148, c. 67, as to the recording by the county clerks of conveyances, construed, *McPherson v. Gordon*, (Ky. 1906) 96 S. W. 791. Facsimile signatures of registers of deeds and recorder of land court may be used in certifying certain instruments. Records of registers of deeds may be attested by the volume, Mass. Acts 1907, Ch. 225. Registers of deeds are authorized to attest unattested records by Mass. Acts 1906, Ch. 67, amending Rev. Laws Ch. 22 Sec. 12. When a deed shows that it has been mutilated and that a plat is gone, the record of the deed is admissible as evidence, *Senterfeit v. Shealy*, 71 S. C. 259, 51 S. E. 142.

Time of recording. Deeds recorded after the expiration of the time prescribed by statute and within two years of the passage of the act are made valid by Ala. Laws of 1907 No. 760. A deed that is made, acknowledged and certified according to law during the term of one clerk of the County Court, though not filed or lodged for record during his term, may be lodged for record during the term of his successor in such office, *Hunt v. Nance*, (Ky. 1906) 92 S. W. 6. Laws 1893, p. 52, c. 40, providing that a land grant registered within two years of January 1st, 1894, should be valid although the time

for registration had expired, was construed to give A, who obtained his grant in 1848 and did not register it until 1895, a valid title against B whose grant was issued in 1875 and registered in 1878, as neither party held actual possession of the land, *Janney v. Blackwell*, 138 N. C. 437, 50 S. E. 857.

When an old deed is offered for registration, the affiant must make an affidavit that he "believes such deed to be a bona fide deed and executed by the grantor therein named" besides the affidavit that the grantor and witnesses were dead, etc. See Acts 1905, p. 323, c. 277 Revisal 1905, Sec. 981. *Allen v. Burch*, 142 N. C. 524, 55 S. E. 354.

Access to records. Nevada Comp. Laws, Sections 2663, 2664, relating to the recording of real estate transactions, was construed as giving an abstract and guarantee company and its employees the right to inspect the records to make abstracts of titles which their clients had commissioned them to look up during regular business hours, but it did not give them the right to copy all the titles and establish a rival registration office. *State ex. rel. Nevada T. G. & T. Co. v. Grimes*, (Nev. 1906) 84 Pac. 1061.

Destruction of records. St. 1906, p. 78, c. 59, relating to the re-establishment of title in case of the destruction of the records, was construed, *Hoffman v. Superior Court, of City and County of San Francisco*, (Cal. 1907) 90 Pac. 939. St. Ex. Sess. Cal. 1906, p. 78 c. 59 was construed as requiring an owner of property to be in actual possession, either by himself or by his tenant's occupying or cultivating the property, in order to entitle him to obtain the benefit of the procedure in the above act when the public records have been destroyed; mere constructive possession is not sufficient, *Lofstad v. Murasky*, (Cal. 1907) 91 Pac. 1008. It was held that "a purchaser under a judgment in a back-tax suit brought against the apparent owner of land will not be protected against the holder of a recorded deed from such apparent owner of land, although the deed book containing the record of the deed had been destroyed by fire before the bringing of the suit," *Manwarring v. Missouri Lumber & Mining Co.*, 200 Mo. 718, 98 S. W. 762.

Sec. 486. What instruments may be recorded—Place of recording. No instrument to be recorded unless acknowledged, Id. Laws 1907, Sen. Bill No. 9, amending Sec. 2994 Rev. Stat. A contract to convey a strip of land to a railroad

for a right of way upon certain conditions may be recorded under Hurd's Illinois Rev. St. 1903, c. 30, section 28, Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523. The registration in Louisiana of an act of sale signed by the vendor alone amounts to a registry of the sale as regards third parties, Lepine v. Marrero, 116 La. 941, 41 S. 216.

Place of recording. The fact that a deed was not recorded in the county where the land lay is not evidence that the grantor did not intend to convey lands lying therein, as it was not his duty to see to the recording, Black v. Skinner Mfg. Co., (Fla. 1907) 43 S. 919.

Ch. 96 Sess. Laws 1897 requiring mortgagees to file their names and addresses with the registers of deeds operates merely to suspend the collection of interest and does not cause a forfeiture of it, Bruce v. Wanzer, (S. D. 1905) 105 N. W. 282.

Sec. 487. Unrecorded instruments—Effect of. To prove actual notice of an unrecorded lease it is not sufficient to prove merely that a person received a letter telling of the lease where the receiver could not read English and destroyed it, Bova v. Norigian, (R. I. 1907), 67 Atl. 326. According to Acts of 1885, p. 233, c. 147, a purchaser under an oral contract who has made valuable improvements on the land, has not a valid title against the purchaser under a mortgage duly recorded after the oral contract was made, although both the mortgagee and the purchaser from the mortgagee had notice, Wood v. Tinsley, 138 N. C. 507, 51 S. E. 59. Under Statutes of 1885 c. 147, p. 233 in regard to the registration of title, a grantee in actual possession of land under an unrecorded deed which was not registered until after a deed of trust still has a perfect title, Laton v. Crowell, 136 N. C. 377, 48 S. E. 767.

Where a guardian sells certain lots and gives a deed which omits one and later to correct the mistake executes a new deed which is not recorded until after the ward, being the record owner and having become of age, has given a deed thereof, the correction deed will not prevail as against the grantee of the ward who had no actual or constructive notice of the omission in the first guardian's deed, Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756. Missouri Rev. St. 1899, valid except between the parties and those who have actual section 925 which provides that no written instrument shall be

notice unless recorded, construed, *Strong v. Whybark*, 204 Mo. 341, 102 S. W. 968. Revised St. of 1887, Sec. 3001 providing that every conveyance of real estate other than a lease of not more than one year shall be void as against a bona fide purchaser for value whose conveyance is first duly recorded was construed in *Froman v. Madden*, (Idaho 1907) 88 Pac. 894.

Sec. 488. Records as notice—Priorities—Various defects. Illinois Laws 1871-72, p. 291, section 30 which provides that all deeds which are authorized to be recorded shall take effect from the time of their filing for record as to creditors and later purchasers does not validate a void tax deed which is recorded as against a later grantee under an unrecorded quitclaim deed, *Glos v. Bain*, 223 Ill. 343, 79 N. E. 111. A purchase of a tax title does not take precedence over a sheriff's deed recorded earlier than the tax deed, *Maddox v. Arthur*, 122 Ga. 671, 50 S. E. 668. Instruments affecting title to real property are held to give notice to subsequent purchasers even if defective in form by the Id. Laws 1907, Sen. Bill No. 58, amending Sec. 2976 Rev. Stat. A purchaser of homestead land is charged with knowledge of all incumbrances or conveyances of the land as shown on the records after the entryman made final proof, *Peterson v. Sloss*, 39 Wash. 207, 81 Pac. 744.

A mortgagor does not hold adversely to the mortgagee unless he renounces the mortgagee's rights, to the latter's knowledge. Recording a conveyance by the mortgagor does not give the mortgagee knowledge of such holding because a subsequent recording is not notice of a prior incumbrance, *New England Mortgage Co. v. Fry*, 143 Ala. 637, 42 S. 57. If a contract for the erection of a building provides that the building shall not be liable for liens from the contractor or sub-contractors, the "no lien" provision is binding only on the principal contractor and not on the sub-contractors when the contract is not recorded, *Stewart Contracting Co. v. Trenton & N. B. R. Co.*, 71 N. J. Law 568, 60 Atl. 405. Where a wife made a fictitious sale of her lands to a third person and he then conveyed to her husband for the purpose of allowing the husband to borrow on it, no mention being made in the third person's conveyance to the husband of how he acquired the title, persons who later took a mortgage from the husband

relying upon the public records which showed that he owned it, and without any notice of the wife's rights, are protected as against her, *Bordelon v. Gumbel & Co.*, 118 La. 645, 43 S. 264. Where an owner of land agrees with an adjoining owner not to sell liquor on the premises for 10 years, and the agreement is recorded, a subsequent purchaser, whose deed is silent as to the agreement, is not bound by it; because it is not a covenant running with the land, and therefore he cannot be bound by the mere constructive notice of recording, *Sjoblom v. Mark*, (Minn. 1908) 114 N. W. 746.

Instrument incorrectly describing property. Where two mortgages to one person have described a property as located in East Orange and Newark, respectively, with identical street descriptions and a third mortgage to the same mortgagee describing it as located at the northwest corner of Watchung Avenue and Ridge Avenue as in the previous descriptions, stated that the property was in the town of West Orange where it really was, the subsequent mortgagee whose mortgage correctly described the property was charged with notice of the two mortgages which did not give the correct town as well as of the one giving the correct town, as the similarity in street descriptions and the identity of the parties were sufficient to put him on inquiry, *Kellogg v. Randolph*, (N. J. Eq. 1906) 63 Atl. 753.

Instrument recorded in wrong book. Under Sections 8979, 8981 and 8988, providing that deeds absolute in form and not intended as mortgages shall be recorded in one set of books and all mortgages and deeds intended as securities in another set and that conveyances not recorded as required shall be void, a deed given as security but recorded in the wrong book is not an incumbrance on the property in the hands of a subsequent grantee who has no actual notice of it, *Grand Rapids Nat. Bank v. Ford*, 143 Mich. 402, 107 N. W. 76.

Will insufficiently authenticated. A grantee from a life tenant under a will of the record owner under a deed which recited that the grantor was the sole heir, was chargeable with notice of the terms of such will although the recorded copy of the will did not, because of insufficient authentication, constitute constructive notice. The grantee and those claiming under him were not, therefore, entitled to the benefit of the

statute of limitations as against the remaindermen under the will until the death of the life tenant although he made improvements and paid the taxes, *Weigel v. Green*, 218 Ill. 227 75 N. E. 913.

Mistake in recording. Under Alabama Code 1896 section 987 which provides that delivery of a conveyance to the recording officer shall operate as a record from the day of delivery a mistake made by the officer in recording it does not affect the mortgagee's rights as against a later purchaser, *Chapman & Co. v. Johnson*, 142 Ala. 633, 38 S. 797. Even though there is a clerical error in recording the name of the notary public before whom the deed was attested, the registration is still constructive notice, *Roberson v. Downing Co.*, 120 Ga. 833, 48 S. E. 429.

Sec. 489. Record as notice—Indexes—Instruments out of chain of title.

Index. In an ejectment suit upon a tax title, it appeared that in an index kept by the register of deeds, ditto marks appeared in the grantor's column under the words "Bayfield County." These marks were followed by the name of the plaintiff as grantee. Held that the plaintiff's deed was properly recorded in the index under a statute requiring an index, *Chase v. Maxcy*, (Wis. 1908) 114 N. W. 832.

Outside chain of title. A purchaser of land from one in possession is bound to take notice of the latter's prior deed recorded in accordance with the statute although outside the regular chain of title, *Eversole v. Virginia Iron Co.*, (Ky. 1906) 92 S. W. 593.

REDEMPTION

See EXECUTION SALES,—MORTGAGES,—TAXES.

REFORMATION

Evidence of mistake, see *ante*, §156.

Mistake in deed, see further *ante*, §91.

Parol evidence affecting instruments, see *ante*, §156.

Reforming contract on decreeing specific performance, see *post*, SPECIFIC PERFORMANCE.

Sec. 490. Mistake in description of property. Where the description of a boundary in a certain deed appeared to have been a mistake of fact the deed was ordered reformed to conform to the real boundary intended, *Paterson v. Hannan*, (Ala. 1907) 43 S. 192. When A has bought a piece of land from B and C also buys the other half section from B, a court of equity will grant relief if A has been given by mistake B's land and B has been deeded A's land, and the deeds may be reformed although more than 6 years have passed, *Union Ice Co. v. Doyle*, (Cal. 1907) 92 Pac. 112. Although a debt secured by a deed of trust has been outlawed, a court of equity may reform the deed which contains a mistake in the name of the county, etc., and the applicants are not guilty of laches when the mistake was not discovered until one month before bringing suit, *Travelli v. Bowman*, 150 Cal. 587, 89 Pac. 347. When it was intended to sell all the land owned by a succession, 718 acres, and the sheriff's deed stated that it conveyed 718 acres, but a forty acre lot was not described therein although contained in the inventory the omission was clearly due to a mistake and the deed was ordered corrected, *Chaffe v. Minden Lumber Co.*, (118 La. 753) 43 S. 397. A deed of lands described as the "Omega" and "Inofoloma" plantations may be reformed so as to include within its operation all the lands commonly known as included within them, *Miles v. Miles*, 84 Miss. 624, 37 So. 112. Where the administrator of an estate sold a farm known as the "Bigelow Farm" at auction and thought he conveyed by the deed the whole of the farm, a court of chancery will reform a mistake in the deed by which certain "gore" land without separate boundaries was not included, *Abbott v. Flint's Adm'r*, 78 Vt. 274, 62 Atl. 721.

A latent error in the description contained in the deed cannot be corrected where the vendor is not a party to the suit, *Bonvillian v. Bodenheimer*, 117 La. 793, 42 S. 273.

Sec. 491. Other mistakes.

Estate granted. When a deed was to be made out to the wife and then to the husband on her death and the husband paid for the land, equity may reform a mistake in the deed granting the land in fee to the wife, *Lehew v. Hewett*, 138 N. C. 6, 50 S. E. 459.

Reformation unnecessary where mistake is ineffective. When the plaintiff executed a quitclaim which recited a former deed of certain described lands but the description by mistake included some lots not described in the original deed it was held that as the later instrument was ineffective as a conveyance of the lots not conveyed by the earlier deed the plaintiff did not need reformation thereof in equity because he could sue at law to recover the land, *Sanborn v. Crowds Bros. & Co.*, (Tex. 1907) 102 S. W. 719.

Mistaken insertion. When the grantor inserted in a deed restrictions against dividing the land into lots of less than a certain size, or against erecting a house costing less than \$5,000, or selling any of the land to negroes, and for the violation of any one of these provisions the land was to revert to the grantor, the grantee was entitled to a reformation of the instrument when he paid for the deed without reading it if he understood that the deed was an ordinary deed without restrictions such as he had agreed to accept, *Lloyd v. Hulick*, (N. J. Law 1906) 63 Atl. 616. Where a written contract for the sale of a tract of less than an acre in area was made at \$200 per acre and later the sellers, ignorant people, executed a deed covering in addition another tract of ten acres but received only the price agreed upon for the smaller tract, within one year of the discovery of their mistake they were granted reformation by having the larger tract stricken out of the deed. As they received no consideration for this tract they were not obliged to offer to return the consideration actually received, *Keeley v. Sayles*, 217 Ill. 589, 75 N. E. 567.

Omission. When a deed recited that the grantor and wife "convey all their ——— in said land" it was held to be very evident that the word "interest" should be inserted in this blank, the omission being a mere oversight, *Burt Lumber Co. v. Wilson*, (Ky. 1906) 93 S. W. 906. Where a lease under a decree directing the leasing of a tract of land for oil and gas, fails to contain the boundary lines, called for by the decree

either through fraud or mistake, and unknown to the lessee, reformation is called for, *Le Comte v. Carson*, 56 W. Va. 336, 49 S. E. 238. Where it appeared that through a mistake of the draughtsman of a contract for the sale of land a provision requiring the payment of interest by the buyer upon a certain deferred payment was omitted, the contract was performed so as to include such a provision, *McCain v. Columbia Funnia Co.*, (Ky. 1906) 97 S. W. 343.

Sec. 492. Mutuality of mistake—Consideration. In a suit to reform a contract for the sale of land the evidence was examined and held to show a mutual mistake which would warrant reformation, *Rundle v. Bohrer*, 222 Ill. 475, 78 N. E. 831. "The rule of law that a mistake like this under consideration, (a mistake in description) to be susceptible of correction, must be mutual, does not mean that both parties must agree on the hearing that the mistake was in fact made, but that the evidence of mutuality in the mistake should relate to the time of the execution of the instrument, and show that at that particular time the parties intended to say a certain thing and by mistake of fact expressed another." *Matthews v. Whitehorn*, 220 Ill. 36, 77 N. E. 89.

Upon a petition with a prayer for the cancellation of a lease on the ground of fraud and for general equitable relief, where the court finds that there was an innocent mistake in the form of the lease, it may order reformation in order that it may conform to the understanding of the parties, *Hardy v. Ladow*, 72 Kan. 174, 83 Pac. 401. Where a contract was written by a justice of the peace to include timber under 12 inches in thickness by mistake, a court of equity had the power to reform the instrument so as to express the true meaning of the parties, as the timber under 12 inches was intended to be reserved, *King v. Hobbs*, 139 N. C. 170, 51 S. E. 911. It was held that the allegations contained in a bill to correct a mutual mistake of the parties to a deed showed that there was no negligence on the part of the plaintiffs and that their rights were not barred by laches. Such a bill is entirely distinct from one to cancel and rescind a contract and the question of restoring the parties to the status quo is not involved, *Peacock v. Bethea*, (Ala. 1907) 43 S. 864. When a grantor and a grantee wanted a deed written passing the grantee a life estate with a remainder to his wife and her heirs but the justice of the peace

who wrote the deed in ignorance of the law, made a mistake of fact in writing the deed, and, instead of writing a deed plainly granting the land as desired tried to do it by writing the wife's name in the habendum clause with that of her husband and wherever the expression occurred "his heirs" struck out "his" and wrote over it "hers", reformation of the deed was decreed. Ignorance of the law on the part of the justice of the peace created a condition of things in which there was a mixed mistake of law and fact, which, as the justice was the agent of both parties, became a mutual mistake and subject to correction in equity, *Williamson v. Brown*, 195 Mo. 313, 93 S. W. 791.

"To justify reformation there must have been a mutual mistake, or mistake on the part of one party coupled with fraud on the part of the other; and the evidence showing this mistake must be clear, satisfactory and free from reasonable doubt. * * * Notice to one purchaser is not notice to others who become tenants in common with him," *Pyne v. Knight*, 130 Ia. 113, 106 N. W. 505. A owned two lots of land with a common driveway one of which he had purchased from C, but when A resold to B making the deed to him identical with the deed from C covering one-half of the driveway, B had no ground for an action to reform the deed when he thought he was receiving a deed to the whole of the driveway as there was no mutuality of mistake since A never intended to deed more than one-half of the driveway, *Stoll v. Nagle*, (Wyo. 1906) 86 Pac. 26. When upon the execution of a bond to convey title the purchaser paid part of the purchase money the seller will not several years later be allowed to have the contract cancelled on the ground that she thought the bond became void in case the balance of the purchase money was not paid within 60 days. "To authorize relief from a contract on the ground of mistake, the mistake must be mutual. It cannot be reformed to express the intention of one of the parties," *East Jellico Coal Co. v. Carter*, (Ky. 1906) 97 S. W. 768.

Pleading. A bill to reform on the ground of mistake which states a mistake of fact in drawing the contract is good against demurrer, although there is no allegation that it was mutual, *Koch v. Streuter*, 218 Ill. 546, 75 N. E. 1049.

Consideration. A deed from the husband through a third person, to his wife, for the sake of providing for her in case of his misfortune in business, is supported by sufficient con-

sideration to justify reformation to correct a mistake in description, *Crawley v. Crafton*, 193 Mo. 421, 91 S. W. 1027.

Sec. 493. Effect of reformation. Where a mortgage states the amount, date of maturity and rate of interest of the notes secured, it may not, as against a purchaser without notice, be reformed in any particular which makes the burden of the lien more onerous than it appeared to be from the recorded mortgage, *Stewart v. Walker*, (Neb. 1907) 113 N. W. 814. When the ancestor of a claimant conveyed to the defendant's testatrix by deeds which contained wrong descriptions which the testatrix could have corrected during her life the claimant could not compel the estate of the testatrix to account to him as heir of her grantor for the rents and profits of such land, *Cunningham v. Cunningham's Estate*, 220 Ill. 45, 77 N. E. 95. Where land was conveyed to S and "her bodily heirs" and later S sued for reformation by omission of those words and obtained a decree which recited that the words were improperly inserted and that S was entitled to have them corrected, but the mandatory part of the decree only directed the grantors to execute and deliver to S a new deed conveying to her an absolute title, and in case of default that the master make such a deed, it was held that a deed executed by the master did not divest the "bodily heirs" of S of the fee in the land, *Teel v. Dunnihoo*, 221 Ill. 471, 77 N. E. 906.

Sec. 494. Action—Jurisdiction—Pleading—Evidence—Limitations.

Limitations. In an action to reform a contract giving the plaintiff a lien on land to secure certain notes the fact that the defendants were not in possession does not prevent them from pleading the statute of limitations, *Stark v. Zehnder*, 204 Mo. 442, 102 S. W. 992.

A bill to reform a deed which states the agreement of the parties, the scrivener's mistake, that the complainant executed it in the belief that it did set forth the agreement, and states the injury caused thereby, sets forth a good ground for equitable relief, no negligence on the part of the complainants appearing on the face of the bill, *Jacobs v. Parodi*, 50 Fla. 541, 39 S. 833. A pleading asking reformation of a deed because of a mistake made by the scrivener is bad where it fails to

state that he acted under the direction of both parties, *Dougherty v. Dougherty*, 204 Mo. 228, 102 S. W. 1099.

Jurisdiction. Rev. St. c. 84, §17 et seq. construed, a law court cannot reform a scrivener's mistakes under the power of this statute, *Martin v. Smith*, (Me. 1906) 65 Atl. 257.

Evidence sufficient. Evidence was examined and held to warrant the reformation of a deed so as to give a daughter of the grantee a life estate with remainder in her children in conformity with the expressed intention of the grantor, *Swinebroad v. Wood*, (Ky. 1906) 97 S. W. 25; *Finch v. Green*, 225 Ill. 304, 80 N. E. 318.

Evidence insufficient. Where the only evidence that a certain administrator's deed contained a mistaken description was an entry in a county abstract, equity refused to reform the deed, *Cunningham v. Edsall*, 200 Mo. 192, 98 S. W. 545. When in a suit to reform a deed the only evidence for the plaintiff consisted of the unsupported testimony of its president it was held that the deed would not be reformed, *Marquette Timber Co. v. Abeles & Co.*, 81 Ark. 420, 99 S. W. 685. Where a deed of 100 acres, more or less, is copied from a prior one and the boundaries are partly on a creek and uncertain, a deficiency of 6.49 acres is not sufficient to warrant the inference of mistake or fraud, *Rathke v. Tyler*, (Ia. 1907) 111 N. W. 435. If a suit is brought to reform a deed by inserting the amount to be paid for land by the grantor's sons to the estate, and the evidence shows that it was omitted intentionally the deed cannot be reformed, *Caudell v. Caudell*, 127 Ga. 1, 55 S. E. 1028. Where the plaintiffs claimed to have mistaken a clause in a deed providing for a 9 degree grade for a road for a 9 per cent. grade, reformation was not decreed where the evidence was conflicting and where the defendants clearly understood what the grade was, *Graham v. Carnegie Steel Co.*, (Pa. 1907) 66 Atl. 103. Where a proceeding is brought to reform a fire insurance policy on real estate, the instrument itself should be submitted in evidence and the bill should also show the particular mistake complained of; a bill to reform an insurance policy made by a scrivener's error for one year instead of three years is insufficient without the policy, *Delaware Ins. Co. v. Pennsylvania F. I. Co.*, 126 Ga. 380, 55 S. E. 330.

REGISTRATION OF TITLE

See TITLE.

RENTS

See LANDLORD AND TENANT.

RESULTING TRUSTS

See TRUSTS.

RIGHTS OF WAY

Private ways, see EASEMENTS.

Public ways, see HIGHWAYS.

Railroad rights of way, see RAILROADS.

SPECIAL ASSESSMENTS

For drainage, see *ante* DRAINAGE.

Sec. 495. Assessments against abutting owners for municipal improvements—Construction and constitutionality of statutes.

Constitutionality of assessment statutes. A provision in the charter of Denver, Art. 7, s. 3, subd. 3, providing that a petition by a majority of the abutting owners shall enable the board of public works to order the paving of the street, and that the finding of the city council that a majority did sign the petition should be final, was constitutional and valid, *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117. The Illinois

Local Improvement Act of 1897, (Hurd's Rev. St. 1903 p. 393) is constitutional, *Harrigan v. Jacksonville*, 220 Ill. 134, 77 N. E. 85; *McChesney v. Chicago*, 227 Ill. 450, 81 N. E. 435. A sale for taxes under an assessment made in accordance with the so-called Madison Act in Mississippi is void because the statute is unconstitutional in providing for assessments based on arbitrary classifications and not on actual values. Code 1880, sec. 539, being a three year statute of limitations as to defective tax sales is not applicable, *Eastland v. Yazoo &c. Lumber Co.* (Miss. 1907) 43 S. 956. Ill. Laws 1903, p. 87, authorizing county commissioners to destroy noxious weeds and levy assessments on the owners of the land to pay the expenses, violates the Ill. Constitution, art. 9, sec. 1, *People v. Board of Com'rs*, 221 Ill. 493 (77 N. E. 914). Tennessee Acts 1905, p. 585, section 278 authorizing a levy of special assessments for municipal improvements upon abutting property does not violate the provisions of the Tennessee or United States Constitution, *Arnold v. Knoxville*, 115 Tenn. 195, 90 S. W. 469.

Statutes noted and construed. Kirby's Arkansas Digest section 6987 and 5717 and Arkansas Constitution, art. 19, s. 27, as to assessment of real estate and petitions by real estate owners for municipal improvements, construed, *Lenon v. Brodie*, 81 Ark. 208, 98 S. W. 979. The Illinois Local Improvement Act of 1897 (Hurd's Rev. St. 1903, p. 393) has been construed in the following cases;—*Hulbert v. City of Chicago*, 217 Ill. 286, 75 N. E. 486. *Connecticut Mut. Life Ins. Co. v. City of Chicago*, 217 Ill. 352, 75 N. E. 365. (sec. 47 et seq.). *Berdel v. City of Chicago*, 217 Ill. 429, 75 N. E. 386, (sec. 47). *McLannan v. City of Chicago*, 218 Ill. 62, 75 N. E. 762. *Roberts v. City of Evanston*, 218 Ill. 296, 75 N. E. 923. *People v. Brown*, 218 Ill. 375, 75 N. E. 989 (sec. 51). *City of Chicago v. Brede*, 218 Ill. 528, 75 N. E. 1044, sec. 73. *Washington Park Club v. Chicago*, 219 Ill. 323, 76 N. E. 383; *Conway v. same*, 219 Ill. 295, 76 N. E. 384; *People v. Cohen*, 219 Ill. 200, 76 N. E. 388. *Gage v. People*, 219 Ill. 424, 76 N. E. 583 (Act 1901, sec. 99). *Heiple v. Washington*, 219 Ill. 604, 76 N. E. 854. *Gage v. People*, 219 Ill. 634, 76 N. E. 834. *Case v. Sullivan*, 222 Ill. 56, 78 N. E. 37. *Chicago v. Burkhardt*, 223 Ill. 297, 79 N. E. 82. *Siegel v. Chicago*, 223 Ill. 428, 79 N. E. 280; *Gage v. same*, 223 Ill. 602, 79 N. E. 294. *Howe v. Chicago*, 224 Ill. 95, 79 N. E. 421. As to the validity of a city ordinance for the building of a sewer passed by virtue of Illi-

nois Local Improvement Act, 1897, see *Gage v. Chicago*, 225 Ill. 135, 80 N. E. 86, same v. same, 225 Ill. 218, 80 N. E. 127; *Chicago v. Galt*, 225 Ill. 368, 80 N. E. 285; *Doran v. Murphysboro*, 225 Ill. 514, 80 N. E. 323; *Chicago v. Baldwin*, 227 Ill. 534, 81 N. E. 542. Code Sec. 971 and Code Supp. 1902 Sec. 792a authorizing sewer assessments, construed, *Reed v. City of Cedar Rapids*, (Ia. 1907) 111 N. W. 1013. Certain Kentucky Statutes authorizing cities to issue improvement bonds constituting a lien on abutting property, construed, *Kraut v. Dayton*, (Ky. 1906) 97 S. W. 1101. Municipal corporations, parishes and drainage districts are authorized to issue bonds and levy taxes for public improvements subject to vote of the district affected by La. Acts 1906 No. 95. Property of railroads made liable to special assessments for improvements by Mo. Laws 1907 p. 92. St. Louis City Charter, Art. 6, Sec. 18, as to special assessments upon abutters for municipal improvements, construed, *Asphalt Co. v. Haussler*, 201 Mo. 400, 100 S. W. 14. Missouri Statutes authorizing the issuance of a special tax bill to owners of land within a sewer district construed in connection with the Kansas City Charter and Municipal ordinances, *Dickey v. Porter*, (Mo. 1907), 101 S. W. 586. *Cobbey & Ann*. St. 1903 Sec. 7552, authorizing assessments for parks and boulevards, construed, *Hart v. City of Omaha*, (Neb. 1905) 105 N. W. 546. County commissioners may assess for street sprinkling in certain towns by N. Mex. Acts 1907 Ch. 31. Assessments for municipal improvements are authorized and the manner of their collection indicated by Pa. Laws 1907 No. 14. The assessment of property outside of municipal limits is authorized for public improvements by Pa. Laws 1907 No. 219. Sec. 277 Rev. Stat. 1898, specifying the time when taxes for special improvements may be levied, amended, Utah Laws 1907 ch. 127. Laws 1899, p. 244, c. 126 amended by Laws 1903, p. 30, c. 27, relating to the assessment of taxes on an assessment district benefited by the construction of an improvement such as a sewer, etc., was construed, *Monk v. City of Ballard*, 42 Wash. 35, 84 Pac. 397. Under its charter the city of Elkins may not collect by means of a special tax or assessment, the cost of sewers constructed by it on its streets or alleys, from the abutting owners. (Acts 1901, chap. 151 p. 420), *Cain v. City of Elkins*, 57 W. Va. 9, 49 S. E. 898.

Streets, sidewalks and paving statutes. Illinois Laws

1897, p. 101, the Local Improvement Act, which provides for levying assessments for street improvements is constitutional, *McChesney v. Chicago*, 227 Ill. 450, 81 N. E. 435. The Illinois Sidewalk Act of 1875, construed, *Marshall v. People*, 219 Ill. 99, 76 N. E. 70. *Hurd's Ill. Rev. St.* 1903, p. 340, c. 24, as to sidewalk assessments, construed, *Hurd v. People*, 221 Ill. 398, 77 N. E. 443. As to the validity of a sidewalk ordinance in Illinois, see *People v. Patton*, 223 Ill. 379, 79 N. E. 51. As to the validity and construction of a municipal street improvement ordinance in Illinois, see *Lindblad v. Town of Normal*, 224 Ill. 362, 79 N. E. 675; *Ogden, Sheldon & Co. v. Chicago*, 224 Ill. 294, 79 N. E. 699. As to the validity and effect of particular city ordinances for the improvement of streets, see *Uhlich's Estate v. Chicago*, 224 Ill. 402, 79 N. E. 598; *Gardner v. same*, 224 Ill. 254, 79 N. E. 624. Illinois Local Improvement Act 1897, as to special assessment for street improvements, construed, *Gage v. Chicago*, 225 Ill. 135, 80 N. E. 86. As to the effect of *Hurd's Illinois Rev. St.* 1903, c. 24, section 605 upon previous legislation as to street improvement assessments, see *Gage v. People*, 225 Ill. 144, 80 N. E. 90. As to the validity of city ordinances for a street improvement in Illinois, see *City of Belleville v. Pfingsten*, 225 Ill. 293, 80 N. E. 266; *Same v. Herzler*, 225 Ill. 404, 80 N. E. 269; *Same v. Perrin*, 225 Ill. 437, 80 N. E. 270; *McChesney v. Chicago*, 226 Ill. 238, 80 N. E. 770. *Hurd's Illinois Rev. St.* 1905, p. 417, c. 24, par. 559, concerning special assessments for local improvements as to their application to a village assessment for street paving, construed, *Watts v. River Forest*, 227 Ill. 31, 81 N. E. 12. *Indiana Laws* 1901, p. 534, c. 231, as to municipal assessments for street improvements construed, *Pittsburgh Ry. Co. v. Oglesby*, 165, Ind. 542, 76 N. E. 165. *Indiana Acts* 1901, p. 537, c. 231, which declares assessments for a street improvement a lien and authorizes an action to foreclose such lien, construed, *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242. *Indiana Acts* 1903, p. 255, c. 145, as to the improvement of gravel and macadamized roads, construed, *Kemp v. Goodnight*, 168 Ind. 174, 80 N. E. 160. *Indiana Acts* 1903, p. 255, c. 145, authorizing county commissioners to build gravel roads upon the petition of landowners to be benefitted thereby, construed, *Ross v. Becker*, (Ind. 1907) 81 N. E. 478.

Kentucky Statutes 1903 sections 3096 as to the construction of sidewalks by cities at the cost of abutters, con-

strued, *Mudge v. Walker*, (Ky. 1906) 90 S. W. 1046. Kentucky St. 1903 section 2833, as to the method of assessing the cost of an alley in a city, construed, *Holt v. Figg*, (Ky. 1906) 94 S. W. 34. Kentucky St. 1903, s. 3706 as to the payment by abutting owners of the cost of constructing streets, construed, *Morton v. Sullivan*, (Ky. 1906) 96 S. W. 807.

The provisions of the Kansas City Charter as to street improvement taxes, construed, *Curtice v. Schmidt*, (Mo. 1907) 101 S. W. 61. The provisions of the Kansas City Charter as to special tax bills construed in connection with a city ordinance for street paving, *Gilsonite Const. Co. v. Ark. McAlester Coal Co.*, 205 Mo. 49, 103 S. W. 93.

For a discussion of the proceedings necessary for assessments for the construction of boulevards under the charter of the City of Omaha, *Comp. Stat. 1897 C. 12a, Sec. 29 & 101 B. and Constitution of Neb. Art. 1, Sec. 21*, see *State v. Several Parcels of Land*, (Neb. 1907) 113 N. W. 248.

R. I. Gen. Laws 1896, c. 72, section 31 concerning proceedings for recovery of the cost of setting curbstones, construed, *Bowers v. Narragansett R. E. Co.*, (R. I. 1907) 67 Atl. 324. R. I. Gen. Laws 1896, c. 72, section 31, as to the lien created by a curbing assessment, construed, *Bowers v. Narragansett R. E. Co.*, (R. I. 1907) 67 Atl. 521.

Pierce's Code. s. 5064, 5071, relating to the assessment of betterments for the opening of a street, was construed, *Quirk v. City of Seattle*, 38 Wash. 25, 80 Pac. 207.

Sec. 496. Assessments—Proceedings—Validity—Benefits.

Validity of proceedings. When upon a petition to condemn land for street widening the jury found that the land not taken was not damaged, such finding did not preclude a later assessment of such lands for betterments, (one judge dissenting), *Chicago v. McCartney*, 216 Ill. 377, 75 N. E. 117. Upon an application for a judgment for the sale of property to pay a special assessment for street grading and paving it cannot be objected that the material used was different from that specified in the ordinance, *People v. Wiemers*, 225 Ill. 17, 80 N. E. 45. A city ordinance for paving with "asphaltum cement" is valid within Illinois, *Hurd's Rev. St. 1897*, p. 356, section 8, which provides that an ordinance for local improvement shall prescribe the nature, character, and descrip-

tion of such improvement, *Chicago Traction Co. v. Chicago*, 222 Ill. 144, 78 N. E. 54. For a case concerning street improvements, the notice required, and the records of assessments with the issue of bonds as provided for under the provisions of the Vrooman Act (St. 1885, p. 147, c. 153), see *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81. The item "Ret. drain, \$1,078" in a report from a county treasurer to a board of supervisors of taxes is not sufficient to authorize them to levy that amount on specific lands; the statement being too indefinite and apparently referring to all lands in the township, *Auditor General v. Tuttle*, 146 Mich 106, 109 N. W. 48. When a city has the right to levy assessments for paving the streets on the abutting owners, when the city council decides "that the public good and the necessity and convenience of individuals requires it," the council cannot delegate the right of determining whether the "public good" requires paving and any assessments levied under such delegated authority are void, *Blanchard v. City of Barre*, 77 Vt. 420, 60 Atl. 970. As to the meaning of "resident owner" within the meaning of the public road, Act 94 Ohio Laws p. 96 which provides that a majority of the resident owners must sign a petition in order to obtain improvements on a public road, see *Alexander v. Baker*, 74 Ohio St. 258, 78 N. E. 366.

Notice. Notice of an assessment to a husband holding by the entirety with his wife, or to one of several co-tenants, is not notice to the wife or to the other co-tenant or co-tenants, *Hinkley v. Bishop*, (Mich. 1908) 114 N. W. 676. When a city has published a notice that it will hold a hearing to consider objections to the assessment of street improvements on property 120 feet from the street, such a published notice does not give the owners of property between 120 and 180 feet from the street due notice of an assessment which the council imposed at the hearing, and the assessment is invalid as to the last 60 feet, but a reassessment may be made whereby the owners may receive proper notice and such reassessment is valid, *State ex. rel. Barber A. P. Co. v. City of Seattle*, 42 Wash. 370, 85 Pac. 11.

Apportionment. Under Kentucky Acts 1888, p. 255, c. 158, as to taxes to abutters for street construction payable in 10 equal yearly installments it was not allowable to divide the total sum by 100, add thereto 10 year's interest, and then allow

that sum to bear interest, *Pfirman v. District of Clifton*, (Ky. 1906) 96 S. W. 810.

Who can object? A general taxpayer has no right to maintain an action to restrain city authorities from making an improvement for the reason that a special assessment made for it is illegal, the requisite number of property owners on the street not having signed the petition. Those whose property is specially assessed are alone interested. The rights of the general tax-payers are not infringed until an attempt is made to discharge the debt from the general funds of the city. This may never occur, *Merritt v. City of Duluth*, (Minn. 1908) 114 N. W. 758. An owner may have relief from an assessment unfairly made even though the property is not assessed for more than its value, as required by law, *Barz v. Board of Equalization of Town of Klemme*, 133 Ia. 563, 111 N. W. 41.

Original construction. Under §2826 Ky. St. 1903, the laying out of a street by an abuttor, by permission of the mayor only, is not an "original construction," *City of Louisville v. Gast*, (Ky. 1906) 91 S. W. 251. When a street was macadamized in 1882 as a county road, in 1895 taken into the territory of the City of Louisville and in 1903 graded, curbed and paved with brick, the work done in 1903 was original construction of a city street, not reconstruction, for which abutting owners are liable, *Heim v. Figg*, (Ky. 1905) 89 S. W. 301.

Agreement. Where abutters on a proposed street signed and delivered to the city the following writing "We—in consideration of the immediate laying out and construction of said proposed street—and of any assessment that may be levied upon our several estates for the cost of said laying out and construction being delayed until the damages caused to us severally by the taking of said land and the cost of construction—shall be determined, and of such damages being offset against the proportionate part of said cost—agree that the payment for said damages shall be delayed until the balance due from us, severally, after making said offer, has been determined" upon acceptance by the passage of an order and seasonable construction of the street, constituted a valid contract under which the duty of setting off the claims was upon both parties jointly, *Boston Water Power Co. v. Boston*, 194 Mass. 571, 80 N. E. 598. An agreement by abutters upon a proposed street, in consideration of its immediate construction and of any betterment assessment being delayed until damages

caused to them should be determined, that the collection of such damages be delayed until the balance due after the betterment was ascertained, was conditional upon the acceptance by the city of the entire offer and its performance within a reasonable time. The delay having been in fact unreasonable the owners were entitled to their damages for the taking and a writ of mandamus to complete the street, although no betterments had been assessed, *Aspinwall v. Boston*, 191 Mass. 441, 78 N. E. 103.

Estimation of Benefits. An assessment on the basis of the possible future value of the lots benefited is void, *Spence v. City of Milwaukee*, (Wis. 1907) 113 N. W. 38. A street watering assessment, based on frontage only, without regard to benefit, is invalid, *Stevens v. City of Port Huron*, (Mich. 1907) 113 N. W. 291. The frontage of the abutting lots may be fixed by the legislature as the basis for taxation to cover the expense of streets and sidewalks, *Wilzinski v. City of Greenville*, 85 Miss. 393, 37 So. 807. Where the extension of a street would terminate in a cul de sac on the land in question and would cut off the owner's access to a railroad and give him no new connection there would be no such benefit as would justify a betterment assessment, *In re Twenty-first St., Kansas City v. Hyde*, (Mo. 1906) 96 S. W. 201. If a railroad and a city jointly built a bridge across the river to the plaintiff's land, the benefit of the easier mode of access to the city by the bridge may be set off against the damages to the plaintiff's land as if the work were done entirely by the city, and this is true when the railroad does all the work, only leaving the city the right of supervision, *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261.

Sec. 497. Assessments—Reassessments—Remedies of abutting owner. A person who under protest paid a sewer assessment made under an unconstitutional statute may recover it in contract, although certiorari by another landowner has been previously denied, *Smith v. Boston*, (Mass. 1907) 79 N. E. 786. Where a city charter gives to owners the right to appear before the board of public works to protest against unfair assessments and to appeal to the circuit court, there is still the right to seek an injunction in equity, *Spence v. City of Milwaukee*, (Wis. 1907) 113 N. W. 38. St. 1885, p. 156, c. 153, s. 11, relating to an appeal to the city council

because "the work has not been performed according to the contract in a good and substantial manner," was construed, *Creed v. McCombs*, 146 Cal. 449, 80 Pac. 679.

Reassessments. *Samborn's Supp. St.* 1906, Sec. 1210 d. authorizes new assessments where the old ones are invalid because the contract under which the work was done is invalid, *Cawker v. City of Milwaukee*, (Wis. 1907) 113 N. W. 419. *Portland City Charter* 1903, §400, relating to the reassessment of property for improvements when the original assessment had been declared void, did not authorize the city to reassess and resell property after a void sale and turn the proceeds over to the purchaser at the void sale as the property might sell for a higher price so the purchaser would receive more than he had paid; the doctrine of caveat emptor applied to him and he was charged with notice, *Gaston v. City of Portland*, 48 Or. 82, 84 Pac. 1040. Section 400 of the *Portland City Charter* was construed as granting the city council the right to make a reassessment of taxes for local improvements which should be retroactive so as to validate a void assessment, and the determination of the assessment by the council was conclusive in the absence of fraud, *Duniway v. City of Portland*, 47 Or. 102, 81 Pac. 945.

Sec. 498. Assessments—Property subject to. A life estate may be sold for the purpose of satisfying an assessment for the reconstruction of a pavement, or sidewalk, *Delker v. Owensboro*, (Ky. 1907) 98 S. W. 1031. When outlying property is taken into a city it is not responsible for failure to make new improvements for drainage nor for failure to reconstruct existing drains. But when the city makes changes in a street it is liable to adjoining owners for damages caused by its negligence in carrying on the operations. Upon all the evidence, however, it was held that the city had not been negligent, *Campbell v. Vanceburg*, 30 Ky. Law Rep. 1340, 101 S. W. 343. *Laws* 1903, p. 241, c. 129, which amended *Laws* 1893, p. 189, c. 84, §19, were construed as enabling a city to include property in an improvement district assessed for betterments because of the extension of an avenue, although it was not contiguous to the avenue, *Westlake Ave.* In re., 40 Wash. 144, 82 Pac. 279. According to *Ballinger's Ann. Code & St.* s. 739, subd. 10 & 13, and the charter of Seattle authorizing the city council to determine the property to be benefited

by a street improvement and to levy assessments on the property, an assessment levied on an abutting railroad right of way is valid as the determination of the property benefited is absolutely within the discretion of the council, *Northern Pacific Ry. Co. v. City of Seattle*, (Wash. 1907) 91 Pac. 244.

SPECIFIC PERFORMANCE

See further, *VENDOR AND VENDEE*.

Sec. 499. What contracts will be enforced specifically—Parol agreements—Liquated damages.

Contracts to devise, see *post*, §638.

Where pending condemnation proceedings to acquire land for a drainage district a compromise was made whereby the owner of the land conveyed to the district with a provision that it would build and maintain a levee and ditch to protect the grantor's remaining land, upon acceptance of the deed a contract existed which equity would order specifically performed, *Sanitary Dist. Chicago v. Martin*, 227 Ill. 260, 81 N. E. 417.

Statute of frauds—Contract to be performed on death.

An agreement between father and son that the former would purchase a farm on which they should live until the father died, at which time it should become the property of the son, will, if fully performed by the son, be specifically enforced on the death of the father, *Harrison v. Harrison*, (Neb. 1907) 113 N. W. 1042. Where the plaintiff remained near her uncle at his request on account of a parole promise that he would convey to her a house and lot which he built for her, and which she occupied, the contract was not within the statute of frauds when it would be a fraud on the plaintiff not to enforce it after the uncle's death, *White v. Poole*, (N. H. 1906), 65 Atl. 255. A parol contract to lease certain premises was made and subsequently a written agreement was signed to make the lease, and a payment of \$100 was made. Then both parties agreed on a written lease and signing it, left it undelivered in the hands of their attorneys. Although it was not binding it was sufficient evidence to satisfy the statute of frauds, and the lessee was granted specific performance of the contract,

Charlton v. Columbia Real Estate Co. 67 N. J. Eq. 629, 60 Atl. 192. The plaintiff was under contract to purchase land and finding himself unable to fulfill the terms of the contract, he induced the defendant to purchase the property under an oral agreement to reconvey the land on the repayment of the purchase price and \$100 for his trouble. Specific performance of the oral contract was decreed, *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775. The defendant executed a deed to real estate and left it with his own attorney for the inspection of the grantee, who had made payment, and the grantee was then able to bring an action for specific performance as leaving the deed properly executed removed the barrier of the statute of frauds, *Robbins v. Porter* (Idaho, 1906), 88 Pac. 86.

Where vendor is only a partial owner. When a vendor without fraud or misrepresentation, makes a contract to convey land of which he owns only a half interest, stating that he acts only as agent for the sale of the other half interest the vendee cannot compel the specific performance of the contract, *Tillery v. Land*, 136 N. C. 537, 48 S. E. 824. A entered into a contract with B to locate three thousand acres of government lands for him under an agreement to pay him \$5.00 per acre for the land which B had the right to pre-empt because he surrendered land which was declared a forest reservation. B then had a right to maintain an action for specific performance, to the extent of the title which A had in the land, *Farnum v. Clarke*, 148 Cal. 610, 84 Pac. 166.

A contract to give a mortgage on land will not be specifically performed unless the debtor be insolvent or some other fact appear which shows the remedy at law to be inadequate, *Brown v. Van Winkle Gin & Machine Works*, 141 Ala. 580, 39 S. 243.

Right of heirs. When a father and two sons bought land and the sons agreed to pay for half of the land and the father paid part of the purchase money on the other half, and on the death of the father certain of the heirs were substituted by agreement for the father, they were entitled to specific performance by the agreement made with the father by the vendor, *Jackson v. Jackson*, 127 Ga. 183, 56 S. E. 318.

In Louisiana a registered promise for the sale of land amounts to a sale, in the sense that the contract gives the purchaser the right to demand a specific performance of the obligation to transfer and deliver. When performed the legal

title passes as of the date of the original agreement so that a third person who buys between the date of the agreement and its performance takes no title, *Lehman v. Rice*, 118 La. 975, 43 S. 639.

Mistake in deed. Where a land company contracted to sell and convey to the plaintiff all the lands and interests in lands owned by said company, but by mutual mistake, the company failed to include a certain piece or parcel of land, now the property of said company; and where the plaintiff mortgaged all the lands conveyed to him, other than the lands in controversy, to the defendant company, and later conveyed all the property that had been conveyed to him to another company subject to the aforesaid mortgage, and subsequently the defendant land company instituted an action for the foreclosure of the mortgage, against the plaintiff and the grantee company, and later entered into an agreement for settlement, to which the plaintiff was not a party, the plaintiff is not estopped from action for specific performance in regard to the lands in controversy. *Shakespeare v. Caldwell Land & Lumber Co.*, 144 N. C. 516, 57 S. E. 213.

Liquidated damages. Where a contract for the exchange of land contains a liquidated damages clause for a breach merely to secure performance, not giving an option to perform or pay damages, specific performance will be ordered, *Koch v. Streuter*, 218 Ill. 546, 75 N. E. 1049.

Increase in value of land. Where the defendant, the owner of land on a branch between two mountains and considered chiefly valuable for timber alone, agreed with the plaintiff, a lower owner, in return for the latter's grant of a right of way for hauling timber over his land to convey all his land at the expiration of four years to the plaintiff at fifty cents an acre, equity granted specific performance of the agreement although at the time for performance the defendant's land had greatly increased in value because of the development of mineral resources and a railroad, *Cox v. Burgess*, (Ky. 1906) 96 S. W. 577.

Sec. 500. Definiteness in contract required. "In order to specifically enforce an instrument it must be definite and certain in its terms, or capable of being made definite by the aid of legal presumptions or by evidence of contemporaneous facts and circumstances which is properly ad-

missible," *Aner v. Matthews*, 129 Wis. 143, 108 N. W. 45. Specific performance of an oral contract for the sale of land was refused because its terms were indefinite and it would therefore be impossible to frame a proper decree, *Fielder v. Warner*, 78 Ark. 158, 95 S. W. 452.

The following covenant in a lease: "Should said party of the first part conclude to sell this property, then said second party is to have the first chance to buy the same": was too uncertain to be specifically performed, *Folsom v. Harr*, 218 Ill. 369, 75 N. E. 987. A contract of sale of "a certain fruit farm, known as the 'Ideal Fruit Farm' and containing about 199½ acres, situated about one and a quarter miles northwest of West Salem, Edwards County, Illinois," is prima facie susceptible of specific performance, *Koch v. Streuter*, 218 Ill. 546, 75 N. E. 1049. When a son merely goes into possession of land without a deed from his father he cannot claim specific performance of an alleged oral contract to deed the land to him unless the evidence is positive, unconflicting and unambiguous, *Meadows v. Meadows*, 60 W. Va. 34, 53 S. E. 718.

Sec. 501. Options. Comp. Laws 1897, Sec. 9035 and 9051 held not to make void an option without witnesses, *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1041. A contract contained in a lease by the terms of which the tenant had an option to buy at the expiration of the lease for \$600 and the added improvements, was ordered specifically enforced, *Meyer v. Jenkins*, 80 Ark. 209, 96 S. W. 991.

After an option has expired, an extension is not granted by the purchaser's saying he wanted two weeks more to think it over to which the owner replied that he would see him again in two weeks. The specific performance of another option granted before the end of the two weeks was decreed, when the purchase price was tendered, *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891. An option on certain coal property was given with the stipulation that it should be null and void if not accepted and the money paid within a certain time; a delay while defects in the title were being cured beyond the time allowed in the option invalidated the agreement and specific performance was not decreed, *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795. A written agreement to convey land, at the option of the proposed vendee, within a given time and

at a certain price, if made upon a sufficient consideration, with full knowledge on the part of the person extending the option that he is bound and the other is not, is such a contract, though lacking mutuality, as will be enforced in equity, where the party holding the option signifies his acceptance within the time limited upon the terms as stated, *Seyfrest v. Groves & S. R. R. Co.*, 217 Ill. 483, 75 N. E. 522. When an agreement contains the clause "It is mutually agreed between the parties hereto that a single failure to pay the rents stipulated or the amounts due under said option of purchase upon the day and dates named herein shall forfeit absolutely for all time the option of purchase contained herein, and shall make said option of purchase or leasehold interest null and void" etc., time is of the essence of the contract and a failure to pay promptly the amounts due breaks the lease and option to purchase absolutely, *Collins v. Delaney Co.* (N. J. Ch. 1906) 64 Atl. 107.

When a part of the purchase money has been paid and an agreement giving 30 days to pay the balance is entered into, it is not an option but an absolute agreement to sell, and delay in payment due to a defect in the title was not a defence to an action for specific performance, *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352.

Sec. 502. Performance required of person seeking.

Where A has sold to B a strip of land 80 feet wide and part of the land conveyed by a deed was not owned by A, a court of equity will not compel the purchase of the land by A although he can purchase it at a reasonable price, *Public Service Corp. v. Hackensack M. Co.*, 70 N. J. 454, 64 Atl. 976. Where an ancestor of the defendant possessed and improved land with the acquiescence of the plaintiff under a contract binding the plaintiff to convey, specific performance of the contract will be decreed, in a cross bill filed by defendant in answer to the plaintiff's action to enjoin trespasses, *Neece v. Neece*, 104 Va. 343, 51 S. E. 739. A contract to convey land in part payment for machinery will not be enforced where the vendor of the machinery has taken possession of it and has received sufficient cash to compensate him for any loss on his contract, *Sanders v. Newton*, 140 Ala. 335, 37 So. 340. When A makes a contract with B for the sale of real estate and pays down part of the purchase price and there is a delay after the first payment in completing the deal, A is entitled to receive a decree for

specific performance of the contract especially when B has expressed himself willing to perform the contract until the time of the refusal of the cash tendered. Unless time is made of the essence of the contract it cannot be broken unless after due notice, *Cosby v. Honaker*, 57 W. Va. 512, 50 S. E. 610. Where a buyer under a written contract made many objections to the abstract of titles submitted and finally, through his attorney, stated in a letter that he would not accept a conveyance and requested payment of the sum declared forfeited under the agreement, and thereupon the sellers notified the buyer's tenant not to take possession and did themselves enter the premises, it was held that the buyer was not entitled to specific performance upon a bill filed two months later, *Sutton v. Miller*, 219 Ill. 462, 76 N. E. 838. A real estate broker gave a city an option on land he did not own and it was accepted, but the broker was unable to deliver title within a reasonable time as protracted litigation occupied over a year. The city notified the broker that it rescinded the contract six months after the time for performance, but when he subsequently obtained the title he had no right to compel specific performance, *North Avenue Land Co. v. Mayor of Baltimore*, (Md. 1906) 63 Atl. 115. A purchaser represents that he acts as agent or trustee of an undisclosed principal, who will erect a large manufacturing establishment and he procures the agreement of the president to sell the property which is subsequently ratified by the corporation on condition that a manufacturing establishment be construed as agreed; but the purchaser has no right to compel specific performance of the contract unless the manufacturing establishment is built, although it is made out to him in his own name, *Balkwill v. Mohr*, (Wash. 1907), 88 Pac. 938. Where in a sale of land a bond was executed and delivered by a vendor to the vendee whereby the vendor obligated himself to execute a deed to the vendee upon the payment of the promissory notes received by the vendor in part payment of the purchase money, the vendor will not be required to execute such deed until the bond is surrendered or has been shown not to be enforceable against the vendor, *Hardin v. Neal Loan & Banking Co.*, 125 Ga. 820, 54 S. E. 755. The plaintiff's parents made a contract with their childless relatives whereby the plaintiff should be taken into their family, treated as their own child and at their death should receive all of their estate. A decree for specific performance against

the wife's heirs was entered as the plaintiff had completely fulfilled her part of the contract and had been a dutiful child, *Anderson v. Anderson*, 75 Kan. 117, 88 Pac. 743.

Sec. 503. Defences. Where a contract for the sale of land forbade an assignment without the seller's consent the buyer who later sold part of the land to a third party could not take advantage in a suit against him for specific performance of the fact that the third party could not compel the original seller to execute a deed to him, *Sproull v. Miles*, (Ark. 1907) 102 S. W. 204. When an action for specific performance is brought against a railroad to construct cattle guards and it does not appear that there will be any use for such structures after they are built, the relief will be refused and the plaintiff's only remedy will be an action at law for damages for breach of the covenant. The railroad cannot have action brought against it for failure to make crossings at designated points according to the agreement made when the right of way was acquired, unless there has been a demand by the plaintiff for the construction of crossings at designated points on the farm, *Johnson v. Ohio R. R. Co.*, 61 W. Va. 141, 56 S. E. 200.

Title lacking. Where a seller had agreed to deliver a lot having a depth of 128 feet but his plat of survey shows only a depth of about 125 feet on one side and 113 on the other, he is not entitled to specific performance, *In Re Martinez*, 117 La. 719, 42 S. 246. If A selling mineral lands has merely a contract for sale from B the real owner, that is no defense to an action for specific performance against C purchasing from A; but C has a right to have some of the purchase price assigned to B to release B's interest, *May v. Getty*, 140 N. C. 310, 53 S. E. 75.

Estoppel. Where a purchaser of real estate asked the seller to release him from his contract of purchase and thereafter the seller conveyed the land to a third party the purchaser was estopped to ask for specific performance, *Hyden v. Perkins*, (Ky., 1907) 99 S. W. 290.

Laches. Where the deceased made a contract to sell land to the plaintiff and the plaintiff knew of the death of the deceased and the administration of his estate, he was estopped by laches from bringing a suit to compel specific performance of the contract after the estate had been settled and the period

for administration ended, *Free v. Little*, 31 Utah 449, 88 Pac. 407. Where time is made the essence of a contract to convey land a delay of 13 years in the payment of instalments, with no evidence of any waiver of the terms of the contract by the vendor, will prevent the purchaser from securing a decree of specific performance, *David Bradley & Co. v. Union Pac. Ry. Co.*, (Neb. 1906) 107 N. W. 238. A agreed to plot his land and sell it at a certain stipulated price to purchasers obtained by B, C, and D, who should provide the money for taxes and development, and receive a share in the profits above a certain sum. The agreement was made in 1889 and the plaintiff's associates threw up their rights under the agreement in 1898 and in 1901 the plaintiff refused to surrender his rights but made no tender of the money to pay the taxes to the city and when the land became very valuable in 1905 he brought suit for specific performance of the contract, but he was estopped by his laches as he had allowed the owner to sustain the whole burden of carrying the property during the years of depression on land values from 1888 to 1905, without any excuse for his delay, *Stewart v. Yesler Estate*, (Wash. 1907) 89 Pac. 705.

Unfairness—Misrepresentation. When pending a partition suit certain heirs contracted to convey their interest in the property for \$2700 and it appeared that they had had a full opportunity to know the exact value of their interest and had previously refused \$2000 therefor it was held that the contract was not so unconscionable that equity would refuse to grant specific performance. The highest figure put upon the value of the property was nearly \$5,000, *Evans v. Evans*, 196 Mo. 1, 93 S. W. 969. When a contract for the sale of land was not fully executed because delivery of possession had not been made to the buyer, it was within the province of the chancellor to say whether the contract which it was being sought to have a court of equity enforce was fair, just, equitable, and grounded upon a sufficient consideration, and, if it was not, it was the duty of the chancellor to withhold the relief, when the evidence showed that the contract had been procured by imposition, undue advantage, or gross misrepresentation by the party seeking the relief, *Bridgewater v. Bryassee*, (Ky. 1906) 93 S. W. 35. When a vendor makes fraudulent representations concerning coal lands claiming that the majority of the coal had not been sold, and the grantee relies on his statements,

then specific performance of the contract will not be granted to the vendor, *Cleavenger v. Sturm*, 59 W. Va. 658, 53 S. E. 593. An innocent misrepresentation that a parcel of land contained 21 acres when in fact it contained but 20 acres, if it induces a party to enter into a contract in writing to buy land, is a sufficient reason for refusing to enforce specific performance of the contract, *Flynn v. Finch*, (Ia. 1908) 114 N. W. 1058.

Sec. 504. Tender. A court of equity will not enforce specific performance of a land contract unless there has been an absolute and unconditional tender of the purchase price. *Terry v. Keim*, 12 Ga. 43, 49 S. E. 736. Rev. Civ. Code Sec. 1151, 1155, 1166 and 1176, prescribing the manner in which tender of payment for land under contract for sale must be made, construed, *Herman v. Winter*, (S. D. 1905) 105 N. W. 457. When the purchaser of land under a contract which provided for forfeiture in case of the failure of the monthly payments, tenders the whole amount due, which is refused, and then remains in possession without making the payments he is still entitled to specific performance of his contract at the end of nine years, *Hairston v. Bescherer*, 141 N. C. 205, 53 S. E. 845.

When a contract of sale provided that the deed was "to be delivered and the consideration paid at the registry of deeds—at 12 o'clock noon of the 1st of August" and just before that date the buyer obtained an extension to August 15, and then failed to appear with the purchase price the seller was entitled to a decree for specific performance without proving a tender of the deed. There was no evidence that time was of the essence, *Staples v. Mullen*, 176 Mass. 132, 81 N. E. 877.

Sec. 505. Parties. Undisclosed owners are necessary parties, *Hopkins v. Baremore*, 99 Minn. 413, 109 N. W. 831. Kirby's Arkansas Digest Section 6011, as to necessary parties in a suit for specific performance of a contract to convey land, construed, *Sproull v. Miles*, (Ark. 1907) 102 S. W. 204. All the owners of the land, against whom a decree for specific performance of a contract of sale is sought, are necessary parties to the suit. An agent, though properly authorized by his principals to execute a deed of conveyance, cannot be compelled by a court of equity to execute a conveyance

in specific performance of a contract to convey. The legal title being in the principals, the decree of the Court must be directed against them, and they must, of course, be parties to the suit before they can be affected by the decree, *Arkadelphia Lumber Co. v. Mann*, 78 Ark. 414, 94 S. W. 46. A defendant who bought land for a firm of which he was a member, where the firm was dissolved before the deed was executed, is not entitled to a decree vesting title in him unless he shows that under the dissolution agreement he became the sole owner of the land, *Chauteau Land & Lumber Co. v. Chrisman*, 204 Mo. 371, 102 S. W. 973. In a suit for specific performance of a contract for the sale of land free from incumbrances where there was a dispute as to the rights of a tenant the buyer may join the tenant, make him interplead with the seller and deduct from the purchase price whatever amount the court finds proper as to the depreciation due to the lease, *Kuhn v. Eppstein*, 219 Ill. 154, 76 N. E. 145.

Sec. 506. Pleading. Sec. 1598, 1600, and 1607 of the Code of Civil Procedure relating to the conveyance of real estate pursuant to contracts made by deceased persons are amended as to petition and decree by Cal. Stat. 1907, Ch. 385. In suits for specific performance of parol contracts for the sale of land the terms thereof must be distinctly, definitely and precisely stated in the bill, and the acts of part performance relied on must be referable to the particular contract, *Maloy v. Boyett*, (Fla. 1907) 43 S. 243. An allegation that the plaintiff made a proposition in writing to the defendant to purchase the land on stated terms and that on the same day the defendant accepted in writing the proposition is a sufficient allegation of the making of a contract for which specific performance is asked, *Fogarty v. Smith*, (Ky. 1907) 100 S. W. 829.

STARTING FIRES

See FIRES.

STATUTE OF FRAUDS

Specific performance of oral contracts, as to land, see *ante*, §499.

Statute of frauds not applicable to case of an express or constructive trust in lands, see *post*, §587.

Statute of frauds as applied to trusts, see *post*, §587.

Sec. 507. What contracts are within. For an enumeration of the cases in which written agreements are required see Cal. Stat. 1907, Ch. 291, amending Sec. 1973 of the Code. When after a dispute between two adjoining owners as to title it was orally agreed that each should retain the parcel they possessed which was claimed by the other, the contract was void within the statute of frauds, *Begley v. Treadway*, (Ky. 1906) 93 S. W. 1045. An oral agreement between daughters who bought land jointly that it should be used as a home for their mother is not enforceable because within the statute of frauds, *Wormald's Guardian v. Heinze*, (Ky. 1906) 90 S. W. 1064. A contract by the plaintiffs to take possession of a farm and board and care for the owner until his death at which time the farm should become the property of the plaintiffs is not within the statute of frauds and is enforceable by the heirs of the plaintiffs who perform the services required, *Soper v. Galloway*, (Ia. 1905) 105 N. W. 399. Where purchasers of land make an agreement with a licensee whereby the licensee agrees to surrender his right to cut timber in return for the purchasers' consent to remove logs already cut, the agreement is not void under the statute of frauds, *York v. Westall*, 143 N. C. 276, 55 S. E. 724.

Reconveyance. Written evidence must be offered to show that at the time of a conveyance of land there was an agreement to reconvey it upon demand, *Patterson v. Patterson*, 200 Mo. 335, 98 S. W. 613. An oral agreement between a judgment debtor and buyer at judgment sale for reconveyance if the judgment be paid by a certain date, made months after the sale, is within the statute of frauds in the absence of consideration therefor, *Warehouse Co. v. Purdy* (Ky. 1907) 102 S. W. 303. A parol agreement between the grantee in a deed of trust for bidding in the land at a sale thereunder and the grantor to reconvey upon the payment of the amount due within a

specified time, is within the statute of frauds, *Campbell v. Bright*, 87 Miss. 443, 40 S. 3. Where one conveys land to another upon the latter's oral promise to reconvey upon demand, although the statute of frauds prevents the grantor from obtaining a reconveyance he can recover the value of the land, *Cromwell v. Norton*, 193 Mass. 291, 79 N. E. 433. Plaintiffs held an option on certain land. Defendants agreed with them orally that if they would get the option extended, and turn it over to him, and if he bought the property, he would resell it within a reasonable time, and would pay them one half the profits. The plaintiffs did their part, but the defendant took title in the name of a corporation controlled by him, and refused to resell. Held that the agreement was one to form a partnership in dealing in real estate, and therefore void under the statute of frauds, even though the plaintiffs had executed their part of the contract, *Langley v. Sanborn*, (Wis. 1908) 114 N. W. 787.

Security. An oral agreement to take conveyance of land and hold it as security for indebtedness is not contrary to the statute of frauds, *Grout v. Stewart*, 96 Minn. 230, 104 N. W. 966. After the foreclosure of a mortgage the mortgagor and a third party entered into an agreement for the redemption of the property with funds of the latter who promised to convey it either to the mortgagor or to a railroad company whose line crossed the land and if to the latter to pay the sum received for it to the mortgagor. Held—as evidence showed that the mortgagor had an equity of redemption at the time of the conveyance from the mortgagee to the third party, this conveyance amounted to a mortgage and the oral promise to convey and pay the proceeds to the mortgagor was void under the statute of frauds, *Rapley v. McKinney's Est.*, 143 Mich. 508, 107 N. W. 101.

Oral contract claimed by both. Where the plaintiff brings suit for the specific performance of an oral contract of sale of real estate and the defendant also claims an oral contract different in its terms and also asking for specific performance, the court may decree specific performance for the defendant when the terms of the oral contract as proved by him are clear and explicit, *Garrett v. Goff*, 61 W. Va. 221, 56 S. E. 351.

Agreement that realty be treated as personalty. An express agreement between partners, or one implied from their acts that partnership realty shall be treated as personalty for

all purposes is not made void by N. Y. Laws, 1896, p. 562, c. 547, section 207, the Real Property Law, requiring the transfer of an interest in land to be made by a deed or conveyance in writing, *Buckley v. Doig*, 188 N. Y. 238, 80 N. E. 913.

Restriction on lessee's business. Where a lease provides that the lessee is "to use and sell exclusively the goods manufactured by the lessor except those imported from a foreign country outside the United States," it is within the statute of frauds as it is a covenant running with the land restricting its use, and it is an equity attached to the lands by the lessor, *Mausert v. Christian Feigenspan*, 68 N. J. Eq. 671, 64 Atl. 801.

As an oral contract to lease land for a year to commence in the future is void within the statute of frauds the tenants are tenants at will and may be ejected under the Kentucky Statutes upon 30 days notice, *Wessells v. Rodifer*, (Ky. 1906) 97 S. W. 341. A parol lease for one year from the expiration of a written lease, made several months before the expiration of the written lease is a "contract for leasing for a longer period than one year from the making thereof," and is void under a statute of limitations containing the language quoted, *Kofoid v. Lincoln Implement & Transfer Co.* (Neb. 1908) 114 N. W. 937.

Agreement to buy for another. The proof of a resulting trust arising from the purchase price being paid by another than the grantee is excepted from the operation of Alabama Code 1896, section 1041, being the Statute of Frauds as to trusts in land, *Long v. Mechem* 142 Ala. 405, 38 S. 262. An oral agreement between bidders at a judicial sale of land to buy in partnership and divide is not void as contravening public policy or the statute of frauds, *Mallon v. Buster & Allin*, (Ky. 1905) 89 S. W. 257. An oral contract between joint owners of land that one shall bid at a public auction thereof for the benefit of all, is valid and created upon its execution a constructive trust not within the statute of Frauds, *Griffin v. Schlenk*, (Ky. 1907) 102 S. W. 837. An agreement between two persons to buy land "in partnership" which resulted in its purchase by one of them, who takes title, the other agreeing to pay half on demand is within the statute of frauds, *Norton v. Brink*, (Neb. 1906) 110 N. W. 669. An agreement to purchase land at a foreclosure sale and convey it to the defendant on his repaying plaintiff for his advances is within the statute of frauds (Sec. 2302 Rev. St. 1898), *Kaufer v. Stumpf*, 129 Wis. 476, 109 N. W. 561. An oral agreement whereby plain-

tiff employed defendant to buy land for him at a public sale, the title to be taken in plaintiff's name and payment to be made by the defendant who was to be reimbursed by plaintiff and paid a commission is not within the statute of frauds, *Schmidt v. Beiseker*, 14 N. D. 587, 105 N. W. 1102. A agreed to purchase B's lands at an execution sale, pay certain judgments and mortgages due on them and then hold said lands for the plaintiff until he could sell them, when he was to pay the plaintiff the surplus over the price he paid at execution sale, but as this agreement was not in writing it was within the statute of frauds and not enforceable in a court of equity, *Bryan v. Douds*, 213 Pa. 221, 62 Atl. 828.

Dealing in real estate. An agreement for dealing in real estate, A to buy, sell and care for the property, B to furnish the capital and take title in his name, is not within the statute of frauds, *Rice v. Parrott*, (Neb. 1907) 111 N. W. 583. An oral agreement between grantor and grantee that the profits on the future sale of the property should be divided goes only to the consideration and is not subject to the statute of frauds, *Allen v. Rees*, (Ia. 1907) 110 N. W. 583. A contract between partners to deal in timber lands, the title to be taken by the one furnishing the consideration and each to share equally in the profits of all sales is within the statute of frauds, *Nester v. Sullivan*, 147 Mich. 493, 111 N. W. 85.

Guarantee of rental. A contract that in case an owner would place her house in the defendants hands for rental they would guarantee her \$35 per month is not within the statute of frauds, *Hewes & Booth v. Loveman*, 146 Ala. 685, 40 S. 306.

Where a verbal contract has been fully performed on one side and the purchaser has received a deed of the premises sold thereunder the statute of frauds is not applicable and the vendor may recover for the unpaid purchase price, *Knight v. Collings*, 227 Ill. 348, 81 N. E. 346.

Sec. 508. Parol gift of real estate. To establish a gift of land there must be a clear and unequivocal proof of facts upon which a reasonably satisfactory conclusion may be based. A gift once made will not be defeated for failure of the donor to make a formal conveyance, *Bevington v. Bevington*, 133 Ia. 351, 110 N. W. 840. In order to take a parol gift of land out of the statute of frauds it is necessary that the donor "enter

into possession of the land under and in reliance upon the contract, and make valuable improvements thereon." *Snow v. Snow*, 98 Minn. 348, 108 N. W. 295.

Sec. 509. Memorandum.

Memorandum sufficient. If the vendor signs a memorandum agreeing to convey timber, and the vendee makes an oral agreement to purchase, it is binding on the vendor when the vendee waives the statute of frauds and sues on the agreement. *Dennis Simmons Lumber Co. v. Corey*, 140 N. C. 462, 53 S. E. 300. The following memorandum: "Chicago, Jan. 8, 1908. Received of Anton Ullsperger \$100 on said purchase of the property No. 1031, Milwaukee Ave., at the price of \$14,000. C. Meyer", is a sufficient memorandum to satisfy the Statute of Frauds and to serve as a basis for a decree of specific performance as against "C. Meyer", *Ullsperger v. Meyer*, 217 Ill. 262, 75 N. E. 482. The following memorandum: "Waitman, Ky., December 23rd, 1901. We have this day sold to James Pool our farm on which we reside, on the Texas road, containing ninety acres, more or less, for the sum of \$2,000.00, \$50.00 received, balance \$1,950.00, to be paid when deed is made. Mary Whitworth, R. F. Whitworth-James Pool:" was sufficient within the Statute of Frauds, Waitman being a station on a railroad commonly known as the "Texas" road. A general warranty deed was necessary under its terms, *Whitworth v. Pool*, (Ky. 1906) 96 S. W. 880. The following memorandum satisfies the statute of frauds: "Received of D. J. Conroy & K. H. Connally (\$100) one hundred dollars to apply on purchase price of lots 2, 3, 4, 5, 10, 11, 12, 13, in block 62, Springfield. Purchase price of lots (\$3,200.00) thirty-two hundred dollars, five hundred dollars of which is to be paid by note (negotiable) upon delivery of Springfield Co. agreements to D. J. Conroy and K. H. Connally. Balance of purchase moneys to be paid in one, two or three years respectfully at 6 per cent interest. Two hundred dollars cash to be paid upon delivery of papers," *Conroy v. Woodcock*, (Fla. 1907) 43 S. 693. A memorandum in writing as follows of a contract for the sale of real estate will bind the writer under the statute of frauds. The description of the land was sufficient for identification. "Received of Julia Crotty One Hundred Dollars, \$100 in cash as first payment one pice of land that I have sole to her this day for one hundred dollars

per acre. It being a pice of land sole to John Effler by the Welsh land improvement 5 acres more or less and that joins the Crotty land and the balance of the (bal. of the money \$100 per acre is to be paid when it is surveyed and deed maid to the said Crotty Feb. 5, 1903. Barbara Effler." Crotty v. Effler, (W. Va. 1906), 54 S. E. 345.

Memorandum insufficient. A memorandum of a contract for the sale of land which does not state the consideration is bad within the Statute of Frauds, Bradley Real Estate Co. v. Robbins, (Indian Terr. 1907), 103 S. W. 777. Where a receipt for five dollars part payment on account of the purchase price of real estate, contains the name of the vendee inserted at his dictation, and is signed and witnessed by the vendor, but omits any mention of the price to be paid by the vendee, it is not binding upon the vendee under Code, §1554, Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104. A letter signed by the defendant, reciting all the terms of an oral contract for a lease as claimed by the plaintiff, except the furnishing of a guarantor, does not contain a sufficient memorandum within the statute of frauds, Bogigian v. Booklover's Library, 193 Mass. 444, 79 N. E. 769. A memorandum concerning the sale of timber said "Received of A \$50.00 as part payment on Deckle and Boyd tracts of timber", but it was not a sufficient memorandum to comply with the statute of frauds as it omitted the purchase price, Corbin v. Durden 126 Ga. 429, 55 S. E. 30. When a blank deed was made out by the auctioneer after an auctioneer's sale and it was not signed by the auctioneer as agent for the mortgagee or by the purchaser, and contained no reference to the advertisement, it was not a sufficient memorandum to satisfy the statute of frauds and the purchaser could not compel the sale of the land, Dickerson v. Simmons, 141 N. C. 325, 53 S. E. 850. The owner of land offered it in writing to A, B wrote an acceptance of the offer and the owner then corresponded with B's attorney relative to closing the transaction but did not agree absolutely to enter into contract relations with B. Held—the statute of frauds was not satisfied, Kaufmann v. Burton, 144 Mich. 487, 108 N. W. 349. The statute of frauds is not satisfied by a memorandum "Accepted", on a written proposal to sell to a corporation, signed by the four trustees of one estate owning a majority of the stock who are four of the five directors, where there is no formal action by directors or stockholders, Taylor v. R. D. Scott & Co., (Mich. 1907)

113 N. W. 32. Where after conversations concerning a sale of land one party telegraphed the other "Will let you have property for \$4,000 cash, and proposition made Baker. Wire answer", and in reply received a telegram of acceptance, it was held that the Statute of Frauds had not been satisfied. The telegrams failed to state the contract with such certainty that its essentials can be known from the memorandum itself, or by reference contained in it to some other writing, without recourse to parol proof to supply them, *Patt v. Gerst*, (Ala. 1907) 42 S. 1001.

Sec. 510. Part performance—Earnest money. A payment of \$10 and the planting of large shade trees by the purchaser of premises under an oral agreement are sufficient to authorize specific performance under Rev. Civ. Code Sec. 1311, *Stewart v. Tomlinson*, (S. D. 1908) 112 N. W. 849. Where it is shown that both parties intend to buy and sell a certain block of land according to a certain townsite plat and that the defendant has taken possession of that block and no more the description is sufficient and in ejectment the court will order a verdict for the defendant, *Bucher v. Overlees*, 6 Ind. Ter. 144, 89 S. W. 1021.

Earnest money. Where the agent of a real estate broker, the latter having authority to sell certain land, received a check in part payment from the purchaser under an oral contract of sale and the broker forwarded his principal the check in settlement of his monthly account and the principal collected the check it became earnest money sufficient to bind the bargain within the Statute of Frauds, *Chouteau Land & Lumber Co. v. Chrisman*, 204 Mo. 371, 102 S. W. 973.

Sec. 511. Part performance—Taking possession and making improvements.

Possession. An oral purchase of lands where the buyer pays the purchase money and is put into possession by the seller is not within the Alabama Statute of Frauds, *City Loan & Banking Co. v. Poole*, (Ala. 1907) 43 S. 13. Where a father made an oral contract with his son for the purchase of land, paid for it and was put into and held possession thereof an equitable title was created in the father which he could plead as a good defense to an action of ejectment by the son who held the legal title, *Shaffer v. Detie*, 191 Mo. 377, 90 S. W. 131.

The taking of possession of one of several parcels of land sold under an oral contract brings the case out of the statute of frauds, *Tillis v. Folmar*, 145 Ala. 176, 39 S. 913.

Possession and improvements. A turned a mine over to B, and B took possession of the property with A's consent and commenced to work it under an oral agreement to assume the care of the leases and bonds and pay \$54,000. B discovered valuable ore in exploring the property and A refused to perform his agreement to transfer the title to him on payment of the purchase money. As A repudiated the agreement B was not charged with interest from the time when the payments became due, and he was under no obligation to deposit the money in court, *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918. Where the plaintiff who for many years had carried on a large business, relying upon an oral contract with the defendant for a lease gave up valuable rights in his old place of business, took possession of the leased premises, made extensive alterations therein at great expense and moved his business thereto so that the defendant's failure to perform the contract would work irreparable injury to the plaintiff, the latter is entitled to a decree for specific performance, *Harrell v. Sonnabend*, 191 Mass. 310, 77 N. E. 764. Where a widow took actual possession under an oral contract whereby the heirs surrendered their interest in consideration of her paying the debts of the estate out of her separate property, and continued in possession and made valuable improvements, the contract was not void within the statute of frauds, *O'Brien v. Knotts*, 165 Ind. 308, 75 N. E. 594. Where a man in possession of only the cleared portion of a tract orally agreed to buy it all, paid down \$50, and began clearing the whole tract for cultivation, the case was taken out of the operation of the Statute of Frauds, *Cross v. Johnstown*, 76 Ark. 363, 88 S. W. 945. The plaintiff erected improvements on land relying on an oral agreement to convey the land, and his title was valid against the title of a purchaser with notice, *Crane v. Cheney*, (Kan. 1907) 91 Pac. 67. Where under an oral contract for the purchase of land the buyer, already in possession, remains, pays part of the purchase price and part of the taxes and makes valuable improvements, there is part performance sufficient to satisfy the statute of frauds, (2 Judges dissent), *Phillips v. Jones*, 79 Ark. 100, 95 S. W. 164. It was held that a person who took possession of a lot of land upon an oral agreement for an exchange and made

improvements thereon with the consent of the original owner was entitled to specific performance and his interest therein was subject to seizure and sale under execution, *Evins v. Sandefur Julian Co.* 81 Ark. 70, 98 S. W. 677. A buyer of land who has in good faith put valuable improvements thereon and resold it taking notes for the purchase price cannot be said to have given no consideration for them because the paramount title later appears to be in the state. The making of the improvements entitled the person making them to an equity and although he might not have been able to enforce such an equity against the sovereign the equity still exists. The seller can therefore recover upon the notes to the extent to which the improvements increased the value of the land, *Williams v. Finley*, (Tex. 1906) 90 S. W. 1087. As an inducement to take up a homestead claim so as to buy out an undesirable neighbor, the owner of a water right orally agreed to give 20 inches of water to the defendant, who took up his residence on the property and used the water right for 14 years. The case was thereby removed from the operation of the statute of frauds and the defendant had a right to the water. *Churchill v. Russell*, 148 Cal. 1, 82 Pac. 440. Although a tenant under an oral lease for five years has made valuable improvements on the premises, he had no ground for preventing the enforcement of the statute making such a lease valid only from year to year unless he showed he would be materially injured on account of the loss of the increased rental value to the premises by reason of such improvements, *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321.

When making improvements ineffective. Where the annual rental of land is worth \$100 to the oral donee thereof the fact that during his twenty-five years of possession he has made improvements to the extent of \$500 does not entitle him to specific performance, *Young v. Crawford*, 82 Ark. 33, 100 S. W. 87. In a suit to enforce an oral contract to convey land the evidence was examined and held insufficient to show that the purchaser made permanent improvements thereon with his own funds on the faith of the contract with the knowledge of the seller, *Standard v. Standard*, 223 Ill. 255, 79 N. E. 92. "Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to and result

from the contract and not the lease," *Steger v. Kosch*, (Neb. 1906) 108 N. W. 165. When the plaintiff was in possession of certain mines under a contract with one of the co-tenants, his continued possession after the purchase of the defendant's interest in the mine under an oral agreement was not sufficient to take it out of the operation of the statute of frauds, *Roberts v. Templeton*, 48 Ore. 65, 80 Pac. 481. When tenants occupy a property given by a mere parol gift, who sometimes pay the rent to the donee and sometimes to the donor, that is not sole possession as required by law and a parol promise to be enforceable against the statute of frauds must be of such character, and for such valuable consideration, which was not shown in this case, that a failure to enforce it would work a fraud on the donee. The mere acceptance of the donor's bounty accompanied by the erection of minor improvements does not constitute sufficient consideration, *Price v. Lloyd*, 31 Utah 86, 86 Pac. 767. An oral gift of land was made by a father to his son in consideration of support by the son which was given until the father moved away to a daughter's house to whom he deeded the land; but the son was not able to obtain a decree for specific performance when he had made no valuable improvements on the land and had only cultivated the same number of acres of land as his father without breaking out any new land and making only a few repairs to the wire fence, *Baldwin v. Baldwin*, 73 Kan. 39, 84 Pac. 568.

STATUTE OF LIMITATIONS

Adverse possession and rights under, see *ante* ADVERSE POSSESSION.

Acquisition of easement by prescription, see *ante* §105.

As to fraudulent conveyances, see *ante* §215.

In enforcing mechanics lien, see *ante*, §347.

As defence to foreclosure of mortgage, see *ante*, §391.

As defence to redemption of mortgage, see *ante*, §410.

Statute of limitations as affecting tax titles, see *post* §562.

Statute of limitations as to co-tenants, see *post*, §568.

Sec. 512. When the statute begins to run—In general.
The statute of limitations begins to run in favor of an occupant

under the timber culture act, as against a railroad company claiming under a grant, from the time possession is taken under the receiver's receipt, *Blumer v. Iowa R. Land Co.*, 129 Ia. 32, 105 N. W. 342. An agent leased a property with the option of purchase at a stipulated price and the lessor purchased the property at the end of an extension of the lease, as provided for in the original document. Then the agent was entitled to his commission and he was not barred by the three year statute of limitations as his right to sue did not begin for five years after the signing of the lease when the lessees actually purchased the property, *Coates v. Locust Pt. Co. of C. of Baltimore*, 102 Md. 291, 62 Atl. 265. Where two actions of ejectment were brought—the second after a voluntary nonsuit in the first and based on a title acquired after the beginning of the first—the statute of limitations would not cease running against the plaintiff's right to recover in the second action until he acquired the new title and began the action. Until he got the new title the defendant's possession did him no injury, *Covington v. Berry*, 76 Ark. 460, 88 S. W. 1005.

Nuisance and other continuing acts. The statute of limitations did not begin to run against a water tank on a railroad right of way, constituting a nuisance, until it was built and operated, *Texas & Pac. Ry. Co. v. Edrington*, (Tex. 1907), 101 S. W. 441. The statute of limitations is no bar to an action to recover damages due to the discharge of water upon land in an unnatural manner for 5 years preceding the action, *Jones v. Stover*, 131 Ia. 119, 108 N. W. 112. When the owner of land is damaged by the deposit on it of material put into a stream in coal mining or coke making, the statute of limitations commences to run against the right to recover damages at the moment of such a deposit, *Day v. Louisville Coal & Coke Co.*, 60 W. Va. 27, 53 S. E. 776. The Connecticut 3 year statute of limitations and 6 year statute construed and it was held that an action by a riparian owner against a city for pollution of a stream by the discharge therein of sewage was within the 6 year statute. Each day such unlawful act was repeated the plaintiff suffered a new invasion of his rights for which he could bring a new suit, *Platt Bros. & Co. v. Waterbury*, (Conn. 1907), 67 Atl. 508. In cases where a nuisance is not necessarily injurious, but may or may not be so, and if it proves to be injurious, the injury continues for a while, inflicts damage, and then entirely ceases, the statute of limitations begins

to run from the time the damage is done and not before; and there may be as many successive recoveries as there are successive injuries, and the statute of limitations runs from the time each of such injuries occurs, *St. Louis Ry. Co. v. Morris*, 76 Ark. 542, 89 S. W. 846.

On change in condition of property. Where in an action by an abutting owner against a street railroad for damages due to a change in the weight of trains and the nature of the business, which change was not made until many years after the road had been constructed and operated, the statute of limitations did not begin to run until the change in operation went into effect, *Grossman v. Houston Ry. Co.*, (Tex. 1906) 92 S. W. 836. When a railroad enlarged a culvert and built a dam below and a ditch to take the water off and later allowed the ditch to get filled up and so caused an overflow upon the abutting land, the abutter's cause of action was not barred until five years from the filling up of the ditch, *Ill. Cent. Ry. Co. v. Taylor*, (Ky. 1905) 89 S. W. 121. When a city improves an alley through which there already runs a drain pipe put in by third parties the city must maintain the pipe, and for its negligence within five years, as a result of which the pipe was stopped up and landowners damaged, a recovery may be had against it, although more than five years (the period of the statute of limitations in Kentucky) had elapsed since the original permanent improvement upon the alley was made, *Central Covington v. Beiser*, (Ky. 1906) 92 S. W. 973. Where a canal company throws up embankments around a property, causing material damage, three years acquiescence without bringing suit will bar all recovery, see *Revisal 1905 s. 395 sub-sec 3*, *Cherry v. Lake D. Canal & W. Co.*, 140 N. C. 422, 53 S. E. 138.

Remaindermen. When a remainderman does not have a right to possession until the termination of the life tenancy, the statute of limitations in regard to adverse possession does not begin to run against him until the death of the life tenant. *Joyner v. Futrell*, 136 N. C. 301, 48 S. E. 649. Where property is conveyed by the husband and wife who hold life estates, a right of action accrues to the remaindermen on the death of the life tenants, and then the statute begins to run against their right of action, *Cherry v. Cape Fear Power Co.*, 142 N. C. 404, 55 S. E. 287. Limitations do not begin to run against the remaindermen until after the death of the life tenant, when

no notice of construction of a railway had been served on them even considering Civ. Code of 1902, §§ 2187, 2188, 2196 which provide that proceedings to recover damages shall be begun within twelve months after completing the construction of the railway. The remaindermen were infants at the time of construction. *Charleston & W. C. Ry. Co. v. Reynolds*, 69 S. C. 481, 48 S. E. 476. Although land was conveyed in trust for a mother, and the remainder on her death to go to the children, yet when the mother has conveyed her life estate, and the grantees have made conveyances duly registered which for over 40 years have claimed to convey the whole title, and the remaindermen have made no effort to regain possession of the land until the death of the mother, the statute of limitations prevents recovery of the land by the remaindermen, *Kirkman v. Holland*, 139 N. C. 185, 51 S. E. 856.

On repudiation of agreement. When a purchaser enters into possession of land under a contract to purchase the property although the contract is by parol only, he has only an equity to require the execution of a deed by the vendor and he cannot obtain the benefit of the statute of limitations, *Poston v. Ingraham*, 76 S. C. 167, 56 S. E. 780. Where one conveys land to another upon the latter's oral promise to reconvey, a sale by the grantee of part of the land and an accounting therefor to the grantor for the proceeds did not constitute a repudiation of the agreement as to the remaining land so as to start the statute of limitations running, *Cromwell v. Norton*, 193 Mass. 291, 79 N. E. 433. Limitations do not run in favor of a buyer holding under a contract of sale when there is no open disclaimer of the holding under the contract brought to the notice of the seller, *Perry v. Arkadelphia Lumber Co.*, (Ark. 1907), 103 S. W. 724. The statute of limitations does not run against a vendor in favor of a vendee holding under a contract for sale and purchase, nor where the original possession of the holder was in privity with the rightful owner, until there is an open and explicit disavowal and disclaimer of holding under that title and assertion of title brought home to the other party, *Tillar v. Clayton*, 76 Ark. 405, 88 S. W. 972.

Taking by eminent domain. A railroad company took without condemnation proceedings a right of way across the plaintiff's land, but the cause of action accrued at the date of the railroad's entry and the damage was not continuing in its character. Under Code Civ. Prac. s. 338, subd. 2, the suit

was barred as it was brought more than three years after the taking, *Williams v. S. P. R. Co.*, 150 Cal. 624, 89 Pac. 599. The statute of limitations of March 27, 1713 was construed as not applicable to takings of water by a borough under the right of eminent domain and the riparian owner had a right of action although over 15 years had passed since the taking. *Stauffer v. E. Stroudsburg Borough*, 215 Pa. 143, 64 Atl. 411.

Sec. 513. Application of statute to mortgages, trusts, and other matters.

In general. Kentucky Statutes 1903, section 2519, being a statute of limitations as to actions based upon fraud, construed, *Jolly v. Miller*, (Ky. 1906) 98 S. W. 326. A state statute of limitations will not begin to run in favor of a railroad company and against a resident upon the land in question, under the homestead laws, until a patent has issued to him, *Northern Pac. R. Co. v. Slaght*, 205 U. S. 122. The deeds to the earlier holders of water rights in a canal provided that when all the water had been sold to the extent of the capacity of the canal that the title should vest in them, but when excess water rights were granted the original holders were entitled to bring suit within five years of the time of granting the excess rights, but if there was a further delay their rights were barred by the statute of limitations, (sec. 2912, 2 Mills Ann. St.) although there was a suit pending against other holders of excess rights besides the defendants, *Patterson v. Fort L. C. Co.*, 36 Colo. 175 84 Pac. 807. If a lot of land has been sold charged with an annual ground rent or interest to be paid to A as a dower and the principal to be paid at A's death, and no payments have been made on said interest or any acknowledgement made of the debt for 21 years, a presumption of payment according to the statute of April 27, 1855, (P. L. 369) s. 7 prevented the collection of the interest or principal. A recent mortgage on the land given by the owner in possession described it as "subject to dowers as by indenture may appear", and again "subject to the aforesaid dowers", but as this mortgage was given to a third party it can not be used as an acknowledgement of the debt, *In re DeHavens Estate*, 215 Pa. 549, 64 Atl. 779.

Dower. A special five years statute of limitations against dower rights does not begin to run in case of fraudulent conveyance in contemplation of marriage until after the death of the husband, *Wallace v. Wallace* (Iowa, 1908) 114 N. W. 913.

The statute of limitations begins to run against a widow claiming dower in lands held by strangers claiming entire title under a deed from the husband on the death of the husband, *Britt, v. Gordon*, 132 Ia. 431, 108 N. W. 319.

Mortgages. The time within which actions to foreclose mortgages shall be brought is designated by Ia. Laws 1906, Ch. 152 Sec. 2. When a debt is barred in Kentucky the mortgage given to secure it is also barred, *McCormick v. Perry* (Ky. 1906) 93 S. W. 607. The Arkansas 6 year statute of limitations applies to a recorded mortgage lien where no memorandum of payments was indorsed on the record, *McCloy et al v. Robertson* (Ark. 1907) 102 S. W. 386. A second mortgagee after a lapse of six years, is barred by the statute of limitations from enforcing his claim for damages against one who cut timber on the mortgaged land, *Jenks v. Hart Cedar & Lumber Co.*, 143 Mich. 449, 106 N. W. 1119. The statute of limitations begins to run on a demand for damages due to the foreclosure of a mortgage after a fraudulent release from the time when the incumbrance is paid off, *In re Hanlin's Estate*, (Wis. 1907) 113 N. W. 411. A took possession of a strip of land in 1890 adjoining his lot and fenced it off. B had given a mortgage on his lot including the strip of land, which fell due in 1893 and the mortgagees foreclosed in 1901 and took possession. The statute of limitations commenced to run against the mortgagee in 1890 as a mortgage is only a lien and more than ten years had passed since A took possession so he had a good title to the strip of land against the mortgagee, *Thornely v. Andrews*, 40 Wash. 580, 82 Pac. 899. Although by Revisal 1905 s. 1044 a power of sale becomes inoperative when a suit for foreclosure would be barred by the statute of limitations, the statute does not begin to run until the whole mortgage becomes due, and even if a power of sale is granted for failure to pay the yearly interest, the default in payment is not ground for the statute of limitations beginning to run against the right of the mortgagee to foreclose, *Scott v. Blades L. Co.*, 144 N. C. 44, 56 S. E. 548. When a mortgage provided that the whole mortgage should become due on failure to pay taxes or any of four promissory notes due at different times, the statute of limitations commenced to run against the rightful mortgagee to recover on the failure to pay the first note and a subsequent payment of the taxes for

one year did not stop the running of the statute, *Snyder v. Miller*, 71 Kan. 410, 80 Pac. 970.

Covenant in deed. An action on a covenant in a deed to refund for shortage is governed by the 15-year statute of limitations, *Holt v. Mynhier's Adm'x*, (Ky. 1906) 96 S. W. 477. Mills Ann. St. §2905 was construed to include a covenant of general warranty contained in a deed in the general three years statute of limitations, and when a breach of the covenant had occurred six years before the suit was brought it was impossible to recover. *Hayden v. Patterson*, (Colo. 1907), 88 Pac. 437.

Trust deed. Mills Ann St. §2900 was construed not to limit the time within which an action to foreclose a trust deed by advertisement and auction sale may be brought, and such trustee may foreclose without regard to the statute of limitations. *Foot v. Burr* (Colo. 1907), 92 Pac. 236.

Trusts. The statute of limitations begins to run in favor of a trustee of a resulting trust when he clearly repudiates it: in the case of a constructive trust, when the wrong, out of which the trust arises, is discovered, *Hanson v. Hanson*, (Neb. 1907) 111 N. W. 368. Ky. Statutes 1903 section 2543 providing that the statutes of limitations shall not apply to a continuing trust, construed, *Howard v. Creech*, 31 Ky. Law Rep. 201, 101 S. W. 974. A cestui que trust although under a disability, is barred by the statute of limitations, when the trustee is, and must seek his remedy against such trustee who has negligently allowed the statute to run, *Waterman, Hall v. Waterman*; 220 Ill. 569, 77 N. E. 142. If the trustee does any act that implies the end of the trust, (such as raising the funds for the mortgagee and having an accounting with him) the trust relation is ended and the statute of limitations begins to run in favor of the trustee, *Hayes v. Walker*, 70 S. C. 41, 48 S. E. 989. When a trustee sold a half interest in the estate with the knowledge of the beneficiary and turned over possession to the buyer without objection, and in the presence of the beneficiary and his wife destroyed a letter containing a recognition of the trust, he thereby repudiated it and set the statute of limitations running against an action by the beneficiary, *Stanton v. Welm*, 87 Miss. 287, 39 S. 457. Where trustees under a will held the legal title to an estate, as against them the statute of limitations ran from the time the adverse possession began, and when the owner of the legal estate was barred all equitable estates dependent upon the legal estate were also barred. And this rule

applies where the cestui que trust is an infant or married woman, or whether the estate is for life or remainder, *Watkins v. Pfeiffer*, (Ky. 1906) 92 S. W. 562.

Homestead. The statute of limitations does not begin to run against a creditor concerning a homestead, until it is abandoned, *Anderson v. Baughman*, 69 S. C. 38, 48 S. E. 38. According to Code Civ. Proc. §318 an action by a wife to recover her homestead from lands of her husband was barred after 19 years although she had surrendered her rights of homestead under the mistaken idea that she was not legally entitled to any homestead rights, *Daniels v. Dean*, 2 Cal. App. 421, 84 Pac. 332. Mississippi Code 1892, sec. 272 which provides that when a mortgagee for conditions broken gets actual possession or is in receipt of the profits or rent the mortgagor may not bring a suit to redeem except within 10 years unless the mortgagee in writing acknowledges this title, does not apply to a void trust deed on a homestead, *Woods v. Campbell*, 87 Miss. 782, 40 S. 874.

Estate of deceased person. The time within which actions must be brought against the estates of deceased persons is extended for 6 months by Ia. Laws 1906 Ch. 151. Where a deceased debtor's estate was unrepresented the statute of limitations did not run against his debts, when the estate was unrepresented for not more than five years, (see Acts 1882-3, p. 104 Civ. Code 1895 §3782), *Hawes v. Glover*, 126 Ga. 305, 55 S. E. 62. When lands are devised, the statute of limitations does not begin to run against creditors to bar their attaching until a nulla bona return has been made and the executor's bonds exhausted, *Brock v. Kirkpatrick*, 69 S. C. 231, 48 S. E. 72. Various sections of the Kentucky Statutes as to the probate of wills and the running of the statute of limitations against such probate, construed, *Mullins v. Fidelity & Deposit Co.* (Ky. 1907) 100 S. W. 256.

Sec. 514. Not a bar to defences—Laches as affecting. The rights of a defendant, in possession of real estate, who pleads an equitable defense in an action of ejectment, and prays affirmative relief based on such defense, are not within the purview of the statute of limitations. In other words, a statute of limitations bars actions, not defenses, *Williamson v. Brown*, 195 Mo. 313, 93 S. W. 791.

An owner will not in equity lose his title by laches until the

expiration of a period as long or longer than the statute of limitations, in the absence of supervening equities, *Updegraff v. Marked Tree Lumber Co.*, (Ark. 1907) 103 S. W. 606.

Sec. 515. Pleading. The defense of the statute of limitations must be raised by a plea, not by demurrer, *Tutwiler Coal &c. Co. v. Wheeler*, (Ala. 1907) 43 S. 15. The defendant had been in possession of a 5 inch strip of land without the plaintiff's knowledge for 35 years, but the plaintiff could not be held to have acquiesced in the boundary, and the statute of limitations of the English common law, 32 Henry VIII, c. 2, did not bar the action when it was not specially pleaded, *Connell v. Clifford*, (Colo. 1907) 88 Pac. 850.

A bill of complaint stating a cause of action begun eleven years after its accrual and barred by the ten year statute of limitations is not good upon demurrer although begun by the next friend, in the absence of an allegation that the complainants were minors or under a legal disability, *Thames v. Mangum*, 87 Miss. 575, 40 S. 327. The defence of limitations must be pleaded and cannot be set up by demurrer, *McCormick v. Perry* (Ky. 1906) 93 S. W. 607. A plea of limitations is sufficient if in the following form: "Defendant states that this cause of action, if cause of action it be, did not accrue within seven years next before the commencement of this suit, and defendant here sets up and pleads and asks that he receive the benefit of the two-year statute of limitations applicable to tax sales, *McKewen v. Allen*, 80 Ark. 181, 96 S. W. 392.

Sec. 516. Suspension of statute—Absence. Certain temporary extensions of the statute are made by Cal. Stat. 1906 Ch. 1, amending Sec. 337 & 339 of the Code. Florida Laws 1861 p. 17 suspended the operation of the statute of limitations and the suspension continued until 1872, *Winn v. Coggins*, (Fla. 1907) 42 S. 897.

Non-residence. Under Code Sec. 3447 Par. 7 the statute of limitations does not run in favor of non-resident owners of real estate, *Stern v. Selleck*, (Ia. 1907) 111 N. W. 451. The holder of a promissory note and a mortgagee who had not begun action within the time set by the statute of limitations were nevertheless entitled to bring suit when the operation of the statute had been suspended by the absence of the mortgagor from the state. The holder of the promissory note could not

plead the statute of limitations against the mortgagee as the mortgagee had a prior lien and was entitled to have his judgment satisfied first, *Perkins v. Bailey*, 38 Wash. 46, 80 Pac. 177.

Sec. 517. Disabilities—Coverture—Infancy.

Effect of disability in acquisition of easement by prescription, see further, *ante* § 105.

Coverture. Kentucky Statutes 1903 section 2506 and 2508 being the statute of limitations as to real estate in regard to married women, construed, *Smith v. Cornett*, (Ky. 1906) 98 S. W. 297. A statute of limitations against dower rights does not run during coverture in case of fraudulent conveyance before marriage, even though the wife might have maintained a bill in equity during coverture, *Wallace v. Wallace*, (Iowa 1908) 114 N. W. 913. Missouri Revised Statutes 1899 section 4262 being a ten year statute of limitations as to real estate construed together with section 4339 which changed the common law rights of a husband in his wife's real estate, and it was held that when a wife fell heir to lands her right of action therefor, did not accrue until the death of her husband, *The married woman's act of 1889* (section 6869 Rev. St. 1889) was prospective, and as to all property acquired by the husband before the passage of that act his rights remained as they were at common law. After the removal of her disability by the death of her husband she had, not three years, but ten within which to bring suit, *Graham v. Ketchum*, 192 Mo. 15, 90 S. W. 350.

Infancy. The statute of limitations as to infancy construed in, *Rankin v. Schofield*, 81 Ark. 440, 98 S. W. 674; *Smith v. Cornett*, (Ky. 1906) 98 S. W. 297. Under Rev. St. 1899 §4265 & 4267 where an infant conveys land and dies in infancy the right to disaffirm his contract passes to his heirs, who, although under 21 years of age, must take advantage of this privilege within three years. Not having done so the title remains in the grantee of the infant, *Robinson v. Allison*, 192 Mo. 366, 91 S. W. 115. Where the legal title to an estate is in the infant heirs of the trustee they are joint tenants, and if a void conveyance is made by the beneficiary, the statute of limitations begins to run against the infant trustees when one of them becomes of age, and a valid title is obtained by 21 years adverse possession, *Cameron v. Hicks*, 141 N. C. 21, 53 S. E.

728. A suit by wards to avoid a sale of their lands by their guardian indirectly to herself is not barred by 10 years' delay after coming of age under Mass. Rev. Laws, c. 202, sec. 24, they having brought such suit soon after hearing of the fraud, and having exercised reasonable diligence. In such a suit by two of the wards against a third who was a grantee from the guardian under a voluntary conveyance where the plaintiffs have judgment but the defendant, having been in possession for more than six years next before the bringing of the action, is allowed for improvements made by the guardian, the plaintiffs may set off their share in the rents during the guardian's occupation, having first deducted therefrom taxes, repairs and insurance, *Sunter v. Sunter*, 190 Mass. 449, 77 N. E. 497.

Sec. 518. Revival of claim by new promise or statute.

Sec. 3456 of the code, providing the method for revival of barred actions, construed, *Iowa L. & Tr. Co. v. McMurray*, 129 Ia. 65, 105 N. W. 361. Interest on claims barred and revived by legislative act limited by N. J. Laws 1906 Ch. 298.

New promise. A writing constituting an equitable mortgage, which secures to a creditor whatever amount may be due him, does not constitute a new promise, and make valid debts barred by the statute of limitations, *Holley's Ex'r v. Curry*, 58 W. Va. 70, 51 S. E. 135. When a trust deed to secure debts was barred by the statute of limitations a deed by the debtor to the creditor which recited that the debtor had "heretofore—executed to" the creditors "a lien upon the property—to secure an indebtedness due to them by me," amounted to a new promise which took the case out of the operation of the statute, *Stewart v. Forman*, (Miss. 1907) 43 S. 67.

Sec. 519. Statutes noted and construed.

Arkansas Acts 1899, p. 117 no. 66 being the statute of limitations for unimproved and uninclosed lands, construed and held constitutional, *Cottonwood Lumber Co. v. Hardin*, 78 Ark. 95, 92 S. W. 1118. *Arkansas Acts 1899*, p. 117 as to the possession of unimproved and uninclosed lands, construed, *Wheeler v. Foote*, 80 Ark. 435, 97 S. W. 447. The burden of proof is upon the party claiming that land is unimproved and uninclosed and therefore within *Arkansas Acts 1899*, p. 117, c. 66, being part of the statute of limitations, *Gaither v. Gage*, 82 Ark. 51, 100 S. W. 80.

Iowa. The time within which actions shall be brought to recover interest in real estate when the spouse failed to join in the conveyance is prescribed by Ia. Laws 1906 Ch. 152, Sec. 1.

Kentucky Statutes 1903 sec. 2546 as to the statute of limitations with regard to city streets, construed, *Covington v. Hall*, (Ky. 1906) 98 S. W. 317.

Maine. Actions for the recovery of lands in incorporated places must be brought within 20 years. Me. Laws 1907 Ch. 117.

Mississippi Code 1892, section 2731 which requires that a person "claiming land in equity" shall sue within 10 years of its accrual, construed, *Jones v. Rogers*, 85 Miss. 802, 38 S. 742.

Missouri Rev. St. 1899 section 650, being the statute of limitations as to an action to quiet title to land, construed, *Burkham v. Manewal*, 195 Mo. 500, 94 S. W. 520. *Missouri* Rev. St. 1899 section 4268, being the statute of limitations as to claimants of land who have not been in possession or paid taxes for 30 consecutive years, construed, *Crain v. Petterman*, 200 Mo. 295, 98 S. W. 600. *Missouri* Revised Statutes 1899 sections 4265, 4262, 4267 and 4268 as to the statute of limitations in regard to real estate construed, *DeHatre v. Edmunds*, 200 Mo. 246, 98 S. W. 744. *Missouri* Ann. St. 1906, p. 2347, the ten year statute of limitations applies to an action for breach of a written contract where the only necessity for going beyond the paper writing is to show performance of the plaintiff and breach by the defendant, *Curtis v. Sexton*, 201 Mo. 217, 100 S. W. 17.

Nevada. Benefits of statute are conferred upon foreign corporations by Nev. Laws 1907 ch. CLXV.

New Mexico. Action on municipal bonds limited to 10 years after maturity by N. Mex. Acts 1907 Ch. 68.

Wisconsin. Claims against estates of deceased persons, if not presented within the required time, are barred by Wis. Laws 1907 Ch. 169.

SURFACE WATER

See WATERS.

SURVEYS AND SURVEYORS

See PLATS AND SURVEYS.

TAXES AND TAX TITLES

Payment of taxes as evidence of adverse possession, see *ante* §16.

For cases illustrating distinctions between real and personal property, see *ante* FIXTURES.

Special assessments on real estate, see *ante* SPECIAL ASSESSMENTS.

Assessments for drainage works, see *ante* DRAINAGE.

Apportionment of taxes on foreclosure of mortgage, see *ante* §403.

While mortgagee is in possession, see *ante* §411.

Taxation as to life tenant, see *ante* §145.

Acquiring of tax title by mortgagee, see *ante* §364.

Sec. 520. Obligation to pay taxes—On whom—To what jurisdiction. Taxes on land are a personal liability against the owner at the time they are assessed and may be recovered from the purchaser of mortgaged land by the mortgagor who bought at the foreclosure, *May's Estate, In re.* (Penn. 1907), 67 Atl. 120.

Land and buildings of agricultural and stock raising companies are to be taxed in the towns where they are situated, *Me. Laws 1907 Ch. 16, amending Rev. Stat. Ch. 9, Sec. 25.* The place of taxation of certain real estate of railroads, telephone and telegraph companies is designated by *N. H. Laws 1907 Ch. 119, amending Ch. 55 Sec. 6. P. S.* When the plant of a company is partly in one county and partly in another, the taxes may be paid to the whole amount in one county and the other county has no remedy, *Morgan County v. Walton County*, 120 Ga. 1028, 48 S. E. 409. Although the act of June 1, 1883 (*P. L. 51*) provides that a farm shall be returned for assessment in the county where the manor house is located, if a power house is built on a part of the farm and the manor house is not used in connection with the farm, the act of 1883 does not make the

power house assessable in the county where the mansion is, especially where the power house is located below the boundary line of the county, which is low water mark, and on a separate piece of ground. The boundary line is not the lowest line reached during a drought but it is the ordinary low water mark, *Appeal of York Haven Water & Power Co.*, 212 Pa. 622, 62 Atl. 97. An act of the Legislature was approved on Aug. 18, 1905, (Acts 1905, p. 62), which provided that a new county "shall be and is laid out" from certain existing counties and a portion of Montgomery county, to be called Tooms county and that its voters should elect county officers on the first Wednesday in October thereafter. On August 21st, a general act of the legislature was approved (Id. p. 46) which made all taxes due the state and county at the time of the creation of the new county payable to the tax collector of the county from which said territory was taken. On October 2d the County Commissioners, by virtue of power contained in Pol. Code 1895, sec. 395, levied an extra tax of \$5 on each \$1000 valuation of property, (in order to build a new courthouse in Montgomery County), in addition to the general tax levy under Pol. Code, 1895, sec. 399. This extra tax, assessed after the passage of the act laying out the county of Toombs and two days before its election of county officers, could not be collected from persons whose property was included in the portion of Montgomery Co. cut off and forming part of the new county, *Pope v. Matthews*, 125 Ga. 341, 54 S. E. 152. By an act of the General Assembly, (Acts 1904, p. 283, c. 167) [Va. Code 1904, p. 484] to incorporate the town of Madison Heights in Amherst county, persons residing within the territorial limits of the proposed town were exempted from payment of certain of the county taxes. This act being repugnant to Const. Art. 13, §168 [Va. Code 1904 p. CCLXII] was inoperative. Action brought to recover taxes levied by the town was ineffective as the town had no authority to collect taxes, *Campbell v. Bryant, Mayor*, 104 Va. 509, 52 S. E. 638. Under N. Y. Laws 1896, p. 801, c. 908, as amended which provides that "if a farm or lot is divided by a line between two or more tax districts and the owner resides thereon, it shall be assessed to him in the district in which he resides," a village having a board of assessors without authority to assess property therein for state and county purposes is not a "tax district," *People v. Gray*, 185 N. Y. 196 (77 N. E. 1172.) Where land had been assessed in

A parish but in 1885 a portion was assessed in B parish and in 1886 adjudicated to the state for nonpayment of state, levee, and parish taxes all of which had already been paid on the assessment of the entire tract in A parish, the adjudication was void. A subsequent assessment by the state to the true owner will be treated in equity as a waiver of the supposed forfeiture, *Booksh v. Lumber & Co.*, 115 La. 351, 39 S. 9.

An entryman upon public lands, by force of his entry, acquires an equitable title, because the right to a patent once vested as respects the government is equivalent to a patent, and the land may be taxed to him although no patent was issued. "For the purpose of ascertaining the ownership of land for the purpose of taxation, and for charging it with the taxes, the officers are not confined to what is disclosed by the registry of deeds, but may have resort to the duly certified copy of entries made on the books of any register of any United States land office on file in the county. The person who appears from this copy to have entered the land will be taken as the true owner unless other records of the county show the title to be in some other person," *Wilcox v. Phillips*, 199 Mo. 288, 97 S. W. 886.

Sec. 521. Purposes of taxation under statutes. For taxation of irrigation districts to repay the United States for advances for construction of works see *Id.* Laws 1907, Sen. Bill No. 140 Sec. 15 B. Tax for Tuberculosis Hospital, Ky. Laws 1906, Ch. 53 Sec. 5. A tax for building and repairing roads may be voted by counties of less than \$3,000,000 assessed valuation, Ky. Laws 1906, Ch. 74. A levy by a county board in Illinois of a county tax of 75 cents on each \$100 of taxable property without specification of the particular purposes for which the tax was levied was void, but this defect was cured by the subsequent passage of Laws 1905, p. 359, which did not conflict with the provisions of the Illinois Constitution, art. 9, section 8, *People v. Wisconsin Cent. Ry. Co.*, 219 Ill. 94, 76 N. E. 80.

Sec. 522. General statutes in regard to taxation. The general law now in force in Kentucky in regard to taxation, (except Ch. 104 of Acts of 1904) is found in Ky. Laws 1906, Ch. 22. A permanent tax commission is created by Minn. Laws 1907 Ch. 408. Ch. 590 Laws 1905 providing for the Assessment of Property and collection of taxes is amended

in detail by N. C. Laws 1907, Ch. 258. For the regulation of taxation in detail see Ore. Laws 1907, Ch. 265-268. Miscellaneous provisions relating to taxation, Vt. Laws 1906 Nos. 29-35. County boards of equalization of taxes are regulated by Wash. Laws 1907 Ch. 129 and the state board by Ch. 215, state board of tax commissioners by Ch. 220. Ch. 29, Code, relating to the assessment of taxes, is amended in detail by W. Va. Acts 1907, Ch. 80.

Sec. 523. Collateral inheritance tax—Constitutionality. Ch. 288 Gen. Laws 1905, taxing inheritances, held constitutional, *State v. Bazille*, 97 Minn. 11, 106 N. W. 93. The Louisiana inheritance tax is not void as to the estates of decedents dying before its enactment where at that time there had been no distribution, *Cohen v. Brewster*, 203 U. S. 543. Louisiana Act No. 109, p. 173 of 1906, imposing an inheritance tax construed in connection with article 236 of the Louisiana Constitution, *Succession of Stauffer*, 119 La. 66, 43 S. 928. Laws 1903 c. 44, taxing inheritances is not a violation of Const. Art. 8, Sec. 1 & 5, *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627.

Sec. 524. Collateral inheritance tax. Statutes amended and construed.

Connecticut. Sec. 2368 Gen. Stat. as amended by Sec. 1 of Ch. 63 of Acts of 1903, providing for taxes on inheritances, is amended by Conn. Acts 1907, Ch. 179, prescribing in detail the property of non-residents subject to the tax and the manner of its collection.

Idaho. Direct and collateral inheritances are taxed and collection provided for by Id. Laws 1907, Ho. Bill No. 78.

Illinois. Ill. Inheritance Tax Law (Hurd's Rev. St. 1903, c. 120, sec. 366) construed, in *re Kingman's Estate*, 220 Ill. 563, 77 N. E. 135.

Iowa. Sec. 1467 of the code, enumerating exemptions from the operation of the collateral inheritance tax, is amended by Ia. Laws 1906 Ch. 54 & 55. A collateral inheritance tax is collectible out of each share in the estate, In *re Stone's Estate*, 132 Ia. 136, 109 N. W. 455.

Louisiana. For the benefit of the public schools an inheritance tax is provided for in detail by La. Acts 1906 No. 109. Louisiana Act No. 45 of 1904, p. 102 as to inheritance

taxes, construed, Succession of Kohn, 115 La. 71, 38 S. 898. Louisiana Act No. 45 p. 102 of 1904, being an inheritance tax, construed, Succession of Abadie, 118 La. 708, 43 S. 306. Various Louisiana statutes as to inheritance taxes, construed, Succession of Pritchard, 118 La. 883, 43 S. 537.

Massachusetts. Rev. Laws Ch. 15, Sec. 1 imposing a tax on collateral legacies is amended so as to exempt property given in trust for public charitable purposes by Mass. Acts 1906 Ch. 436. [See St. 1907 Ch. 563]. The manner of calculating the amount of the collateral inheritance tax payable under Rev. Law Ch. 15, is designated by Mass. Acts, 1907, Ch. 452. The taxation of direct and collateral inheritances is provided for by Mass. Acts 1907 Ch. 563.

Michigan. Act 188 of 1899 taxing inheritances is amended by Mich. Acts 1907 No. 155. The inheritance tax law (No. 188 of 1899) does not apply to property devised to testator's children and grandchildren by a will probated in 1865, *Miller v. McLaughlin*, 141 Mich. 425, 104 N. W. 777. Mortgages, notes, land contracts and papers representing property within the state belonging to a non-resident are subject to the inheritance tax, *In re Rogers Estate*, (Mich. 1907) 112 N. W. 931.

Minnesota. A trust fund divided into four parts payable to the beneficiary at the age of 25, 30, 35 and 40 years is subject to the payment of the inheritance tax (c. 288 Laws 1905) as each portion becomes due, *State ex rel. Hale v. Probate Court of Hennepin County*, 100 Minn 192, 110 N. W. 865.

New Hampshire. Ch. 40 Laws 1905, taxing collateral inheritances, is amended by N. H. Laws 1907 Ch. 68.

New Jersey. The act to tax inheritances, May 15, 1894, is amended by N. J. Laws 1906, Ch. 227 & 228.

New York. Ch. 24 Sec. 221 Gen. Laws taxing transfers is amended by N. Y. Laws 1907 Ch. 204.

Ohio. The direct inheritance tax of Ohio is repealed by O. Laws 1906 p. 229. As to the effect of the statute repealing the Ohio inheritance tax law see, *Friend v. Levy*, 76 Ohio St. 26, 80 N. E. 1036.

Tennessee Statutes 1885 p. 71 c. 24 being a six year statute of limitations for the collection of privilege and property taxes does not apply to the Inheritance Tax Law (acts 1893 p. 356 c. 174) but the latter act provides a distinct system of taxation and contains a separate section as to limitation of

actions thereunder, *Miller v. Wolfe*, 115 Tenn. 234, 89 S. W. 398.

Texas. Inheritance taxes are prescribed by Tex. Laws 1907 Ch. xxi.

Washington. Laws of 1901 & 1905 taxing inheritances are amended by Wash. Acts 1907 Ch. 217.

West Virginia. Ch. 33 Sec. 1 & 2 Code, taxing inheritances, are amended by W. Va. Acts 1907, Ch. 55.

Sec. 525. Collateral inheritance tax—Property taxable—Amount of tax—Adopted child.

In estimating the value of an estate for the purposes of the inheritance tax it is not proper to deduct the compensation to be paid a trustee for the management of the estate, *State ex rel. Basting v. Probate Court of Hennepin County*, 101 Minn. 485, 112 N. W. 878.

Income reserved. Where an unrecorded trust deed, not made in contemplation of death, took effect upon delivery for the benefit of the beneficiaries except that the grantors reserved \$2400 out of the income annually for themselves the inheritance tax applied only to so much of the estate conveyed as was necessary to produce the \$2400 income, *People v. Kelley*, 218 Ill. 509, 75 N. E. 1038.

Effect of agreement to devise. Where a testator broke his agreement to devise all his property to his stepdaughter and she, in a suit against the executors, trustees, and beneficiaries under the will, prevailed and the agreement was held valid the property was subject to the transfer tax because it actually devolved under the will to the beneficiaries who held as trustees for the stepdaughter, (2 Judges dissenting), *In re Kidd's Estate*, 188 N. Y. 274, 80 N. E. 924.

Property within jurisdiction of state. The words of Acts 1899 No. 188 Sec. 21, providing that property subject to the inheritance tax "shall include all property or interest therein whether situated within or without this state, over which this state has any jurisdiction for the purposes of taxation" mean "property which is within the power of the state to tax, and not property which state policy has selected for purposes of general taxation, *In re Stanton's Estate*, 142 Mich. 491, 105 N. W. 1122.

Property of non-residents. A note owned by a non-resident, secured by a mortgage of Michigan real estate, is subject

to the Michigan inheritance tax, *In re Merriam's Estate*, 147 Mich. 630, 111 N. W. 196. Under Code Sec. 1467, taxing collateral inheritances, shares of stock in Iowa corporations and evidences of debts owed by residents of Iowa, owned by a non-resident, are not taxable, *Gilbertson v. Oliver*, 129 Ia. 568, 105 N. W. 1002.

Adopted child. New York transfer upon death tax statute, construed, Laws 1896, p. 869, c. 908, section 221, and it was held that by virtue of the Domestic Relations Laws 1896, p. 226, c. 274, section 64, a son of an adopted daughter of a testator was a "lineal descendant," *Cook's Estate in re*, 187 N. Y. 253, 79 N. E. 991.

Sec. 526. Exemption from taxation—General statutes amended and construed.

Idaho. Property exempt from taxation in Idaho is enumerated in Id. Laws 1907, Ho. Bill No. 84, amending Sec. 2 of Act of March 22, 1901.

Iowa. Funds of fraternal beneficiary associations are exempted from taxation by Ia. Laws 1906 Ch. 48. A rebate of taxes is allowed those using wide tires by Ia. Laws 1906 Ch. 63.

Kansas. Property exempt from taxation in Kansas is specified in detail in Kan. Laws 1907 Ch. 107, Art. 2.

Maine. Rev. Stat. Ch. 9, Sec. 6 Sp. x exempting a planted forest from taxation for 20 years is amended by Me. Laws 1907, Ch. 169.

Massachusetts. Veterans of the civil war and their widows are exempted from payment of certain taxes by Mass. Acts 1906 Ch. 315 [See 1907 Ch. 367.]

Minnesota. The area of homestead exemption is specified by Minn. Laws 1907 Ch. 335.

Texas. Art. 5065 Rev. Civ. Stat., enumerating the property exempt from taxation, amended by Tex. Laws 1907 Ch. CLIX.

Vermont. Various exemptions from taxation are made by Vt. Laws 1906 No. 23-27.

West Virginia. Ch. 29 Sec. 57, Code, exempting property from taxation is amended by W. Va. Acts 1907 Ch. 75.

Wisconsin. Forest tree plantations are exempted from taxation for 30 years by Wis. Laws 1907 Ch. 592.

Sec. 527. Exemption from taxation—Factories—Railroads—Waterworks.

Factories. City Councils are given power to exempt from taxation industrial or manufacturing plants, with certain limitations of time by Ala. Laws of 1907 No. 797 Sec. 20½. New plants for the production of electricity from water power are exempted from taxation by Ala. Laws of 1907, No. 442. Property of beet sugar and other factories is exempt from taxation by N. Mex. Acts 1907 Ch. 12. Under Louisiana Constitution article 230 a plant devoted to the manufacture of "fertilizers and chemicals" is exempt from taxation, *Planters Fertilizers & Co. v. Board of Assessors*, 116 La. 667, 40 S. 1035. The exemption of capital, machinery, and property employed in the manufacture of wooden articles contained in Louisiana Constitution 1898, article 230, does not apply to a part of a building used for the storage and sale of such articles, and other articles, bought by the manufacturer for resale, *Victoria Lumber Co. v. Rives*, 115 La. 996, 40 S. 382. A city furnished a lot of land and cash to a shoe manufacturing company in consideration of the company's transferring their business to the City, and the City further agreed to exempt the property from taxation for 50 years if it were used for 10 years as a shoe factory, but Acts 1890, p. 175, c. 180, did not grant the City power to exempt property from taxation which was not actually used for manufacturing purposes and, although it was not taxed for 11 years while used as a shoe factory, the City had a right to levy taxes on it after the factory was closed, *Havre de Grace R. E. & P. Co. v. Mayor of Havre de Grace*, 102 Md. 33, 61 Atl. 662.

Pub. St. C. 55, §11, relating to the exemption of proposed manufacturing establishments, was construed not to permit anyone not conducting such an enterprise to obtain exemption although he leased it to one whose business was entitled to exemption, *Portsmouth Shoe Co. v. City of Portsmouth*, (N. H. 1907) 66 Atl. 1045.

Railroads. Electric railroads are exempt from taxation by Vt. Laws 1906 No. 40. Under Sp. Laws 1873 c. 111, exempting from all further taxation the property of railroads accepting its provision, a road is exempt from a special assessment for a ditch under Ch. 258 Laws 1901, *Patterson v. Chicago R. I. & P. R. Co.*, 99 Minn. 454, 109 N. W. 993. Louisiana Constitution article 230, exempting railroads from taxation for

10 years if completed before January 1, 1904, applies to a railroad which runs regular passenger and freight trains, with a fixed schedule of charges, although owned by a limited company and primarily intended and used to carry logs to a saw-mill, *Amos Kent Lumber & Brick Co. v. Tax Assessor*, 114 La. 862, 38 S. 587. The legislature by the Act of March 16, 1891, pp. 61-62 has exempted railroads from taxation for 20 years when built in accordance with the provisions of the act, and Rev. St. 1901, par. 3834, was construed not to repeal the exemption, *Bennett v. Nichols*, (Ariz. 1905), 80 Pac. 392.

Water works. Dams and reservoirs used for irrigation, watering stock, mining and generating electricity are exempted from taxation for 10 years by Ariz. Laws of 1907 Ch. 92. Land owned by a private corporation which supplies water to the inhabitants of a town and obtained by eminent domain is being used for a public purpose and exempt from taxation. It is the character of the use to which the property is put, and not the party who uses it, that settles the question, *Milford Water Co. v. Hopkinton*, 192 Mass. 491, 78 N. E. 451.

Sec. 528. Exemption from taxation—Exemption as a right—Assignment—Back taxes on property purchased. Under Act Dec. 24, 1887 (Laws 1887 p. 1090) the Columbia Canal and the appurtenances thereof were transferred to a board of trustees, to develop the canal, the said canal its lands and appurtenances being exempt from all taxes except for state purposes. Under Act Dec. 24, 1890 (Laws 1890 p. 967) power of sale of the property was conferred on the board of trustees. The purchaser of the canal from the trustees under the act of 1890, takes it free from taxation except for state purposes; and the levy and collection of taxes for county purposes by a state officer is illegal and void, contrary to the Constitution of the United States, (article 1, §10) and the Constitution of South Carolina (article 1, §21) 1868, *Columbia Water Power Co. v. Campbell*, 75 S. C. 34, 54 S. E. 833.

Assignee's rights. A corporation purchasing the property and franchise of another corporation through foreclosure of a deed of trust, does not succeed, by virtue of the assignability of the original contract of exemption from taxation, to the rights of the original corporation but is governed by Code 1887 §1324 [Ann. Code 1904 p. 623], *Lake Drummond Canal &*

Water Co. v. Commonwealth, 103 Va. 337, 49 S. E. 506, with exhaustive discussion of authorities.

Taxes unpaid on property purchased. Land bought by a religious society is liable for the taxes already due for the current year, McHenry Baptist Church v. McNeal, (Miss. 1905) 38 S. 195. After the expiration of the time within which the tax roll may be altered by the addition or removal of property, a corporation whose property is exempt from taxation purchases property subject to the taxes assessed upon it and is not relieved from them, Public Schools of City of Iron Mountain v. O'Connor, 143 Mich. 35, 108 N. W. 426.

Estoppel to claim. Although a corporation had entered into the possession of certain government lands which were non-assessable, it was estopped from denying the validity of a tax imposed on such land when it was included in the company's statement of assets, Inland L. & T. Co. v. Thompson, 11 Idaho 508, 83 Pac. 933.

Land acquired from the United States becomes subject to taxation when the full purchase price has been paid and a complete equitable title vested in the purchaser, State v. Otasca Lumber Co., 100 Minn. 355, 111 N. W. 276.

Sec. 529. Exemption from taxation—Public property and bonds. Property of municipalities in other taxing districts is made taxable by N. J. Laws 1906 Ch. 147. Ch. 24 Sec. 4 Subd. 7 Gen. Laws, exempting from taxation real estate of free public libraries in certain villages is amended by N. Y. Laws of 1907 Ch. 693. Under sec. 110 (111), c. 12a, Comp. St. 1903, a public park is not subject to assessments for street improvements, Herman v. City of Omaha, (Neb. 1906) 106 N. W. 593. A city fire apparatus, electric light plant, poles, wires, and a house and lot used for public purposes are not liable for state and county taxes, Commonwealth v. Paducah, (Ky. 1907) 102 S. W. 882. Under N. Y. Laws 1896, p. 797, c. 908, section 4, exempting from taxation property of a municipal corporation held for public use "except the portion of such property not within the corporation" and the Greater New York Charter, the constructions placed upon land owned by the city of New York outside of its limits and used in connection with its waterworks system are taxable in the town where situated, Re city of New York, 183 N. Y. 245, 76 N. E. 18.

Mass. St. 1904, p. 340, c. 385, which taxes certain land of

the Commonwealth if leased for business purposes, construed not to apply to land held under a bond for a deed, *Corcoran v. Boston*, 193 Mass., 586, 79 N. E. 829. The United States government sold the mint site in Philadelphia but retained the title until the completion of the payments on the building and reserved to itself the right to declare a forfeiture if all the payments were not made. The city assessed it for taxation from the time when the purchaser entered into possession but it was still exempt from taxation until fully paid for as it was government property, *Mint Realty Co. v. City of Philadelphia*, (Pa. 1907) 66 Atl. 1130.

When a town owns a dispensary with a stock of liquors, it is public property within the meaning of the Pol. Code 1895, §762 and is exempt from taxation, although the town has no authority to operate the dispensary, *Walden v. Town of Whigham*, 120 Ga. 646, 48 S. E. 159.

Bonds of the Commonwealth are exempt from taxation by Mass. Acts 1906 Ch. 493. Deposits of savings banks invested in bonds of the Commonwealth are exempted from taxation by Mass. Acts 1907 Ch. 246, amending Rev. Laws Ch. 14 Sec. 19. Towns may exempt from taxation their bonds when held by their own citizens, N. H. Laws 1907 Ch. 55.

Districts. The rights of way and similar property of irrigation districts are exempted from taxation by Mont. Laws 1907, Ch. 70 Sec. 51. Where lands of a sanitary district, parts of which were leased and subject to taxation, while other parts were exempt because used for a public purpose, were assessed and taxed as a whole the entire tax is not void, because it was the duty of the district to notify the taxing officers what land was being used for public purposes. A judgment for such unpaid taxes should be against the lands, not the district, *Sanitary Dist. of Chicago v. Hanberg*, 226 Ill. 480, 80 N. E. 1012.

Sec. 530. Exemption from taxation—Property of educational institutions. Ch. 908 Sec. 4, sub-div. 7, Laws 1896 exempting from taxation the property of corporations organized for educational and other purposes is amended by N. Y. Laws 1906 Ch. 336. Lands used for encampment and assemblies by educational corporations are exempted from taxation by Wis. Law 1907, Ch. 543. The provision of the Louisiana Constitution exempting from taxation "all the prop-

erty of Tulane University of Louisiana of whatsoever character" is not limited to such as is in its actual corporeal possession but applies to a case where it is universal legatee of the residuum under a will, *Tulane University v. Board of Assessors*, 115 La. 1025, 40 S. 445.

Property which has been exempt from taxation because used for educational purposes becomes subject to taxation on its abandonment for those purposes with the intent not to use it for such, *Holthaus v. Adams Co.*, (Neb. 1905) 105 N. W. 632.

Whether educational use—Lease. In Kentucky college property leased by the trustees to one who carried on a private school for profit thereon is exempt from taxation, *Commonwealth v. Trustees of Hamilton College*, (Ky. 1907) 101 S. W. 405. The mere fact that a university rents out some of its property does not make such property subject to taxation within Tennessee Acts 1899, p. 1084, c. 435 sec. 2 subd. 2, *Vanderbilt University v. Cheney*, (Tenn. 1906) 94 S. W. 90. A house rented to a person not an employee of the college, and a barn used by the president for storage, both on land owned by the college, was not exempt from taxation. "It is the use of the property at the time when the tax is assessed which determines whether it is exempt from taxation or not, *Amherst College v. Amherst*, 193 Mass. 168, 79 N. E. 248. Under Rev. St. 1898 Sec. 1038 subd. 23, providing that the property of Turner societies used "exclusively for educational purposes" is exempt from taxation, a building with a saloon and a barber shop rented continuously and a gymnasium rented occasionally, all for the benefit of the society, which uses the gymnasium for exercise and lectures, is not exempt, *Gymnastic Ass'n. of the South Side of Milwaukee v. City of Milwaukee*, 129 Wis. 429, 109 N. W. 109. An educational institution incorporated by a special act whose leased land was exempt from local taxation, was constitutionally deprived of such exemption by the N. Y. General Tax Law, 1896, (2 judges dissenting), *Pratt Institute v. City of New York*, 183 N. Y. 151, 75 N. E. 1119.

Schools. Under Illinois Constitution 1870, art. 8, section 2, property received in exchange for property granted to the municipality for the use of schools, and the rents thereof, are "proceeds" and therefore exempt from taxation, *People v. City of Chicago*, 216 Ill. 537, 75 N. E. 239. Land acquired by school trustees in foreclosing a school fund mortgage is not exempt from taxation or special assessment under the Illinois

Const. 1870, art. 8, section 2, unless the money loaned was received by the trustees before the adoption of the constitution: neither is it exempt by the revenue act (Hurd's Rev. St. 1903, art. 12, section 6), *R. & C., Grosse v. People*, 218 Ill. 342, 75 N. E. 978. The dormitories, dining hall and "Reynolds Club" in the University of Chicago campus are exempt from water taxes under the Chicago ordinances, *Chicago v. U. of Chicago*, 228 Ill. 605, 81 N. E. 1138.

When the professors held the capital stock of an educational institution, and no dividends had ever been paid, the property was liable for taxation, even when large donations had been received from various persons, Brennan Ass'n. v. Harbison, 120 Ga. 929, 48 S. E. 363.

Sec. 531. Exemption from taxation—Property of charitable, religious and cemetery institutions. Paragraph 4 §3 of the General Tax Law of 1903 (P. L. 1903 pp. 395, 396) relating to the exemption from taxation of property belonging to charitable institutions was construed, *Sisters of Charity v. Corey*, (N. J. Err. & App. 1907) 65 Atl. 500. Lands used for encampments and assemblies by corporations organized for moral and religious purposes are exempted from taxation by Wis. Laws 1907 Ch. 543. Md. Acts 1904, p. 474, c. 263, which exempts the "wharf property"—belonging to the ministers and trustees of the Starr Methodist Protestant Church, in Baltimore City, "from taxation" is unconstitutional, *Mayor, Etc. of Baltimore v. Ministers, Etc., M. P. Church*, (Md. 1907), 67 Atl. 261.

Beneficiary societies. The property of a Masonic Lodge, organized partly to assist needy members and their families, is exempt from taxation, *Plattsmouth Lodge No. 6, A. F. & A. M. v. Cass County*, (Neb. 1907) 113 N. W. 167. A corporation whose sole object is to provide a suitable home for destitute widows and orphans of a certain secret society is exempt from taxation within the Kentucky Constitution, *Widows' & Orphans' Home of Odd Fellows v. Commonwealth*, 31 Ky. Law Rep. 775, 103 S. W. 354. The property of the Royal Highlanders, a fraternal beneficiary association, issuing beneficiary certificates on the lives of its members, is not exempt from taxation under ch. 43 Comp. Stat. 1903, *Royal Highlanders v. State*, (Neb. 1906) 108 N. W. 183.

Where association is supported in part by charity. Dormi-

tories used in connection with a church school where women and girls were taught free if unable to pay, the total yearly expenses being greater than the tax income, are exempt from taxation under Kentucky Constitution Article 170, *Morgan v. Presbyterian Church*, 31 Ky. Law Rep. 38, 101 S. W. 338. The A. M. A. owns real estate and buildings which are used solely for the maintenance of a negro school. The nominal fees fail to meet the expenses of the school and the deficit is payed by charitable donations. This property is exempt from taxation under the provisions of section 762 of the political Code of 1895, *Brewer, Sheriff, v. American Missionary Ass'n.*, 124 Ga. 490, 52 S. E. 804.

A farm owned by a hospital corporation is not exempt from taxation under Cons. Art. 9, Sec. 3, *State v. St. Barnabas Hospital*, 95 Minn. 489, 104 N. W. 551.

Excess value. The charitable corporation which owns Tremont Temple in Boston now worth more than \$350,000, the sum exempted from taxation under its charter, must pay taxes on the excess in its value although at the time of its purchase it was worth less than that sum, *Evangelical Society v. Boston*, 192 Mass. 412, 78 N. E. 407.

Cemetery property. Ch. 908, sec. 4, sub-div. 3 Laws 1896 exempting cemetery property from taxation, is amended by N. Y. Laws 1907 Ch. 725.

Sec. 532. Assessment—General statutes.

Alabama. A State Tax Commission is created and its powers and duties prescribed by Ala. Laws of 1907, No. 337.

California. The law covering assessments, equalization, and collection of taxes of the state and counties is amended in detail by Cal. Stat. 1907, ch. 368.

Florida. Special statutes of Florida as to assessments of taxes upon real estate in the City of Orlando, construed, *City of Orlando v. Giles*, 51 Fla. 422, 40 S. 834.

Illinois. Under the Illinois Constitution, article 9, section 12, and Hurd's Rev. St. 1905, p. 1823, c. 122, section 202, a city may levy a $2\frac{1}{4}$ per cent. tax to finish a schoolhouse for which it is already indebted up to the constitutional limit, *People v. Chicago & T. R. Co.* 223 Ill. 448, 79 N. E. 151.

Iowa. The levy of taxes for library purposes is provided for by Ia. Laws 1906 Ch. 21. Platting of land for taxes by the county auditor is prescribed by Ia. Laws 1906, Ch. 30, amend-

ing Sec. 922, 923 and 924 of Code. The collection of interest on taxes in special charter cities remaining unpaid for 4 years is prohibited by Ia. Laws 1906, Ch. 32, the same rule applied generally by Ia. Laws 1906 Ch. 51, repealing Sec. 1391 of the Code. The valuation of forest and fruit tree reservations for taxation is fixed by Ia. Laws 1906, ch. 52, sec. 10. Addition to road tax, Ia. Laws 1906, Ch. 56, amending Sec. 1530 of the Code. Tax levy for care of insane is authorized by Ia. Laws 1906, Ch. 94, repealing Sec. 2292 of Code. The time for estimating school taxes is changed by Ia. Laws 1906, Ch. 136, Sec. 14, amending Sec. 2806 of the Code.

Kansas. State tax commission created and duties prescribed, Kan. Laws 1907, Ch. 107 Art 25.

Kentucky. The fiscal court of any county is authorized to levy taxes to provide for the payment of bonds issued for the building of turnpikes by Ky. Laws 1906, Ch. 20. Taxes for school purposes are authorized and the mode of collection designated for cities of the second class by Ky. Laws 1906, Ch. 79. Kentucky Statutes 1903, section 3677, as to the levy of taxes by towns of the sixth class, construed, *Carpenter v. Lambert*, (Ky. 1906) 92 S. W. 607. Kentucky Statutes 1903, section 3174, providing that a city assessor shall assess all real estate every four years construed in connection with article 171 of the Kentucky Constitution which declares that the General Assembly shall provide an annual state tax, and held not unconstitutional, *Worton v. Paducah*, (Ky. 1906) 93 S. W. 617.

Louisiana. The maximum rates of parochial and municipal taxes are established by La. Acts 1906 No. 64.

Minnesota. The methods of determining the amount of money to be raised by taxation are prescribed by Minn. Laws. 1907 Ch. 404.

Montana. The use of taxes in payment of current expenses is permitted and maximum tax filed by Mont. Laws 1907 Ch. 106.

Nebraska. Taxation in cities of 40,000-100,000 is regulated in detail by Neb. Laws 1907 Ch. 9 Sec. 4, 6, 9, 10, 12, amending C. A. S. Sec. 7712, &c.

New Jersey. N. J. P. L. 1903, p. 418 as to the amendment by a court of an assessment for taxes, construed, *Royal Mfg. Co. v. City of Rahway*, (N. J. 1907), 67 Atl. 940. New Jersey P. L. 1905, p. 126, creating a board for equalization, revision, review and enforcement of tax assessments, con-

strued, *Mayor v. Board of Equalization*, (N. J. 1907) 67 Atl. 38, *Tuckerton R. Co. v. State Board of Assessors*, (N. J. 1907), 67 Atl. 69. The act of April 8, 1903, relative to the assessment of taxes, is amended as to the preparation of tables of aggregates by county boards by N. J. Laws 1907 Ch. 127.

New Mexico. For a special tax as Cattle Indemnity Fund see N. Mex. Acts 1907 Ch. 89 Sec. 12. Taxes to pay the Territorial Institution Bonds are directed by N. Mex. Acts 1907 Ch. 89 Sec. 38.

Pennsylvania. Taxes assessed by supervisors of townships of the second class for repairing roads are validated by Pa. Laws 1907, No. 209.

South Carolina. Sec. 1208, Civil Code, authorizing the voters of school districts, who return property for taxation, to levy taxes for schools is amended by S. C. Acts 1906 No. 71, and by Acts 1907 No. 292.

Utah. Special tax funds in certain cities are regulated by Utah Laws 1907 Ch. 140.

Virginia. Ch. 23 Code, assessment of lands, amended by Va. Acts 1906 Ch. 319. Sec. 1529 Code, authorizing city councils to levy taxes for school purposes, is amended by Va. Acts 1906 Ch. 80. The law of March 17, 1906 re-enacted the law of Dec. 10, 1903, (Acts 1902-03-04, p. 610, c. 388) and the court construed it as validating all assessments made under the defective law, and as granting the right of appeal from unjust assessments for taxes before Feb. first next, after the passage of the curative act, *Whitlock v. Hawkins*, 105 Va. 242, 53 S. E. 401.

Washington. Sec. 1263 B's Codes, relating to filing of plats and taxing them, is amended by Wash. Laws 1907, Ch. 44.

Sec. 533. Assessment—Validity of levy—Back taxes. Duties are prescribed for tax commissioners and assessors by Wis. Laws 1907 Ch. 401. Illinois Laws, 1901, p. 272, sec. 1, amending the revenue act construed in connection with *Hurd's Rev. St.* 1905, c. 121, sec. 14 which provides for an increased tax levy upon the filing of a certificate of the highway commissioners, *Cleveland C. C. & St. L. Ry. Co. v. People*, 223 Ill. 17, 79 N. E. 17. In Illinois an item in a county tax levy "For payment of county claims (Janitor's services, supplies, repairs, improvements and current expenses) \$12,000" does not state

the purposes of the levy with reasonable certainty, and it is, therefore, void, *People v. Cincinnati I. and W. Ry. Co.* 224 Ill. 523, 79 N. E. 657. An ordinance by a city which has reached its debt limit levying a tax for 15 years for the payment of water bonds to be issued, is void (*Wilkins, J., dissenting.*) *East Moline v. Pope*, 224 Ill. 386, 79 N. E. 587. Under Cons. Art. 11, sec. 3 and Laws 1903, c. 444 a levy of an annual tax for 20 years to provide for the payment of principal and interest of bonds issued for the cost of viaducts is valid, *Bingham v. Board of Sup'rs of Milwaukee County*, 127 Wis. 344 106 N. W., 1071.

Back taxes. Gen. St. 1901, Sec. 1669, 7599 were construed not to give power to the county clerk and board of commissioners to collect back taxes for previous years on mortgages which were concealed from the assessors, and such a levy was void. *Board of Com'rs v. Lane*, (Kan. 1907), 90 Pac. 1092.

Sec. 534. Assessment—In whose name—Reassessment—Separate lots. Tennessee Acts 1903, p. 632, c. 258, providing for the assessment of taxes for state, county and municipal purposes against the owner upon the 10th of January, construed, *Chattanooga v. Raulston*, (Tenn. 1906) 97 S. W. 456. Where after the assessment of land to the plaintiff it was sold on a mortgage foreclosure subject to the tax, the plaintiff could not restrain the collector from collecting the tax from him, but upon being obliged to pay it was subrogated to the rights of the collector against the buyer at the foreclosure sale, *Webber Lumber Co. v. Shaw*, 189 Mass. 366, 75 N. E. 640.

Name. Where land is assessed to the true owner and also to a third person the later erroneous assessment does not invalidate the former valid one, *Shelby v. Friedrichs*, 117 La. 679, 42 S. 218. When a widow uses the initials of her deceased husband, and is known by his name, an assessment in which she is so described is sufficient, *Tieman v. Johnston*, 114 La. 112, 38 S. 75. Where land was assessed to "H. E. Evarts", but the tax attorney who brought suit for back taxes knew that the owners were Henry E. Evarts and Mary Evarts and Henry E. had done nothing to induce anyone to believe that his name was "H. E. Evarts", and was a nonresident of the state, an order of publication directed to "H. E. Evarts", was

insufficient and the judgment against him and subsequent sheriff's sale, void, *Evarts v. Missouri Lumber & Mining Co.*, 193 Mo. 433, 92 S. W. 372.

Reassessment. Comp. Laws Sec. 3918 and 3919, providing for reassessment of taxes rejected by the Auditor General, construed, *Auditor General v. Fleming*, 142 Mich. 12, 105 N. W. 71. The authority to reassess rejected drain taxes must be given by the board of supervisors, *Auditor General v. Tuttle*, 146 Mich. 106, 109 N. W. 48. Kentucky Statutes 1903 sections 4023, 4024 and 4049 as to the assessment of land construed and it was held that thereunder if the state once assesses property for a given year and collects the taxes upon it, it cannot thereafter reassess the same property for the same year in the name of another, though the latter be the real owner, and collect the tax, *Commonwealth v. Ingalls*, (Ky. 1905) 89 S. W. 156.

Separate lots. An assessment of two tracts of land together as one tract is a material defect in the proceedings, under Laws 1890, Ch. 132, Sec. 32 and Laws 1897, Ch. 32, Sec. 1, *State Finance Co. v. Myers*, (N. D. 1907) 112 N. W. 76. If a railroad company has a lease of land under water from the riparian commissioners and it is beyond the exterior line for solid filling, the assessors may subject it to taxation either under a separate description or with the land back of the line fixed by the riparian commissioners for solid filling, *Mayor of Jersey City v. State Board of Assessors*, 73 N. J. Law 164, 63 Atl. 21. Washington Const. Art. 7, §1, and Mont. Laws 1899, p. 294, c. 141, §11 and sec. 18 were construed to enable the court to determine the exact amount of taxes on certain lots when a number of lots had all been assessed together as one block, but the tax roll alone or the oral testimony of the assessors were insufficient to establish the valuation, *Sound Inv. Co. v. Bellingham Bay Land Co.* (Wash. 1907), 88 Pac. 1117. Mills Ann. St. Sec. 3776, relating to a refund of taxes on real estate, was construed as not making an assessment void because the assessor returned the property en masse, although the tracts were not contiguous and a personal property tax was included in the amount for which the land was sold. The personal tax should not be refunded except by the County commissioners and the purchasers of the tax certificate should be paid the money they spent with interest as a condition pre-

cedent to a reconveyance, *Elder v. Board of C. Com'rs of C. County*, 33 Colo. 475, 81 Pac. 244.

Sec. 535. Assessment—Valuation and rate—Increase—Review.

Rate. The limitation of the rate of taxation is provided for by N. J. Laws 1906, Ch. 116. Limitation of rate in towns to 15c per \$100 is made void by N. J. Laws 1906, Ch. 199. Arkansas Constitution, 1874, art. 16, section 9, which limits county taxes for general purposes to a certain percentage of the property therein contained, construed, *Doniphan Lumber Co. v. Reid*, 82 Ark. 31, 100 S. W. 69; *Gaither v. Gage*, 82 Ark. 51, 100 S. W. 80. By Acts of 1888 p. 113, c. 98 a number of districts were annexed to Baltimore and sec. 18 (page 127) provided that the taxes on such property should not be increased until avenues, streets and alleys had been opened, graded, curbed and otherwise improved from curb to curb, and that a block of ground should contain not exceeding 200,000 ft. Acts 1902 c. 130 p. 199. Although a 25 foot alley had a number of changes in grade and was paved but had no curb stones, and the paving was in bad repair, it was paved, etc., as required by law, and the block was assessable at the city rates although it contained more than 200,000 feet, *Mayor, etc. of Baltimore v. Rosenthal*, 102 Md. 298, 62 Atl. 579. Annexation Act s. 19 (Acts 1888, p. 127, c. 98) declaring that the taxation of property within the limits added by the city should not be increased as long as it remained landed property and Acts 1902, p. 199, c. 130, s. 4a were construed, and although a block did not contain "6 dwelling houses" as prescribed by the act, it was not "landed property" when there were churches on it and a few houses, and when the streets were graded and curbed from curb to curb including the alleyways, being improved as much as many parts of the city of Baltimore itself. This block, therefore, should bear the increased rate of taxation, *Hiss v. Mayor, etc., of Baltimore*, 103 Md. 620, 64 Atl. 52.

Review. Under Code Sec. 1373, appeals from the board of equalization may be taken within 20 days of the *final* adjournment of the board, and may be made orally, *Barz v. Board of Equalization of Town of Klemme*, 133 Ia. 563, 111 N. W. 41. In Louisiana a police jury as a board of reviewers has no authority to reduce assessments of its own motion, in the absence

of a contest by the tax payer, Police Jury of Concordia Parish v. Campbell, 117 La. 75, 41 S. 358. In Louisiana the assessment of the property of a taxpayer is presumed to be correct until he proves the contrary. Upon an appeal to a court from the decision of a board of review the court cannot review assessments of persons other than those appealing, Pons v. Board of Assessors, &c., 118 La. 1101, 43 S. 891. Rev. Laws, Ch. 14 Sec. 67, permitting validity of taxes on corporations to be determined by the supreme judicial court, amended by Mass. Acts 1906 Ch. 349.

From the absence of any provision for appeal from the order of the county board in making the tax levy will be inferred the intention of the legislature not to allow such an appeal. Whedon v. Lancaster County, (Neb. 1906) 107 N. W. 1092. Under Cobbey's Ann. St. 1903 Sec. 10,512 and 10,528 the state board of equalization of taxes has no power over the action of the county assessor as to value of property or its liability to assessment, State v. Drexel, (Neb. 1906) 107 N. W. 110. In an appeal to the district court from the state board of equalization the burden is on the appellant to show that the decision of the board is erroneous, Lancaster County v. Whedon (Neb. 1906) 108 N. W. 127. County boards for the equalization of taxes are established by N. J. Laws 1906 Ch. 120. Sec. 1, art. 1, c. 31, p. 341, Session Laws of 1905, relating to the power of boards of county commissioners to issue certificates showing error in the assessment of taxes, was construed, Bostick v. Board of Comm'rs, (Okl. 1907), 91 Pac. 1125. Various Tennessee Statutes as to the collection of taxes and the powers of the State board of equalization as to assessments, construed, Briscoe v. McMillan, (Tenn. 1907) 100 S. W. 111. Sess. Laws 1901, sec. 35, p. 248, relating to a dispute regarding the assessment on a piece of real estate, was construed as giving the taxpayer a right to appear before the board of equalization and have his property assessed for its actual cash value, but where he makes no statement of the cash value of his property the fact that it was assessed in 1903 higher than in 1902 does not give him a right to a reduction, especially when it is contended that the board of equalization has really reduced the amount to a fair value, Humbird L. Co. v. Thompson, 11 Idaho 614, 83 Pac. 941.

A mill was unoccupied and depreciating in value but there was a mortgage on it of \$500,000 and the assessors

valued it at \$230,000 but where only the evidence of physicians and others was introduced concerning the dilapidated condition of the mill, and there was no evidence to prove bad faith on the part of the assessors the Court of Chancery had no power to change the valuation as that lies absolutely within their discretion, *National Tube Co. v. Shearer*, (Del. 1905), 62 Atl. 1093.

Review of acts of assessors by County Commissioners is provided by Fla. Laws 1907, Ch. 5605, amending Sec. 525 and 526 Gen. Stat.

Fraud. When an assessor values coal leases worth five million dollars at five hundred thousand a mandamus may be issued to compel him to assess the coal leases at their real value if it is shown that his undervaluations of them is the result of corruption, partiality or caprice so that his action is flagrantly unjust and a clear disregard of his duty, *State ex rel. Dillon v. Bare*, (W. Va. 1906) 56 S. E. 390.

A sworn statement under Massachusetts Rev. Laws c. 12, Section 41, is a condition precedent to an abatement of a real estate tax, *Amherst College v. Assessors*, 193 Mass. 168, 79 N. E. 248. In an action for delinquent taxes it is no defence under Gen. St. 1894 Sec. 1588 that the assessment is unfair unless application has been made to the board of equalization for a readjustment of the assessment, in repayment of real estate taxes in Pine county, 96 Minn. 392, 105 N. W. 276.

Increase in valuation. As to notice to owners whose taxes are increased by the board of equalization, and sufficiency of the board's findings, see *Lancaster County v. Whedon* (Neb. 1906) 108 N. W. 127. As to rights of the board of review of a municipality to increase tax valuations during the running of the decennial period for tax-appraisements as prescribed by Ohio Rev. St. section 2819-1, see, *Davies v. National Land & Inv. Co.*, 76 Ohio 407, 81 N. E. 755. Mississippi Code 1892, section 3799 which provides that an assessment may only be changed "in case of an increase of value by the erection of improvements," refers to improvements actually put on the land in question, *Hancock Co. Sup'rs v. Simmons*, 86 Miss. 302, 38 S. 337. Pol. Code 3789, requiring ten days notice of a raise in the assessed value of real estate when the owner shall have an opportunity to have the matter considered, was construed to render void an increased assessment without such

notice provided the owner paid the amount that was admitted to be due, *Montana O. P. Co. v. Maher*, 32 Mont. 480, 81 Pac. 13.

Sec. 536. Assessment—Description of property. Kirby's Arkansas Digest section 6976 et seq. as to the assessment of land for taxes by the largest subdivision thereof possible, construed, *Bonner v. St. Francis Levee Dist.*, 77 Ark. 519, 92 S. W. 1124. For purposes of taxation land uncovered by the gradual recession of a lake is sufficiently described if designated by the section number which it would have if officially surveyed and by which it was popularly known, *Buckner v. Sugg*, 79 Ark. 442, 96 S. W. 184. A description in an assessment roll which is the same as that by which the owner took title is good as against him, *People v. Weimers*, 225 Ill. 17, 80 N. E. 45. Where in the assessment and sale of a city lot for taxes the number, square and streets which bound it are not the same as those appearing in the debtor's title, the description may, however, identify the property and for this purpose extrinsic evidence is admissible. Where the tax purchaser is actually put in possession of a lot smaller than that called for by the tax deed the title is perfected only to the extent of the possession, in *re Martinez*, 117 La. 719, 42 S. 246.

Assessment invalid. An assessment is fatally defective and void if it contains such a falsity in the description or designation as renders identification not reasonably possible, *Shelly v. Friedrichs*, 117 La. 679, 42 S. 218. An assessment of land which describes it simply as .75 of an acre in a certain 40 acre tract is too vague and uncertain to afford a basis for a legal assessment of a tax, *State v. Linney*, 192 Mo. 49, 90 S. W. 844. An assessment of land by reference to a lot number is invalid if there be no plat in existence on which such lot could be located; it is not sufficient that its location may be found by reference to a deed, *Mayat v. Auditor General*, 140 Mich. 593, 104 N. W. 19. A description of land in the assessment roll as "Town N. 23x200 ft. deep. Lot 2 Block—" is so clearly indefinite as to make the assessment void, even though the owner was not misled, *Grand Forks County v. Fredericks*, (N. D. 1907) 112 N. W. 839. Where property is described in an assessors book by meaningless letters its assessment is void and no title passes to the purchaser at tax sale, *Moran v. Thomas*, 19 S. D. 469, 104 N. W. 212.

Sec. 537. Assessment—Omission of property from. Kentucky Statutes 1903 section 4241 as to listing omitted property for taxation, construed, *Lucas v. Commonwealth*, (Ky. 1905) 89 S. W. 292. *Commonwealth v. Reed*, (Ky. 1905) 89 S. W. 294. Laws 1900 c. 50 and Code Sec. 1373, providing for assessments upon property omitted by the county treasurer, construed, *Gibson v. Cooley*, 129 Ia. 529, 105 N. W. 1011. Code Sec. 1374 and Supp. 1902 Sec. 1407a providing for limitation of actions to collect assessments on omitted property construed, *Shearer v. Citizens' Bank*, of Washington County, 129 Ia. 564, 105 N. W. 1025. Under Code Sec. 1373 and 1374 and Acts 28th, Gen. Assem. p. 33, c. 50, authorizing assessments on omitted property, no action for damages may be brought against a treasurer who intentionally makes a wrong assessment, *Stevens v. Carroll*, 130 Ia. 463, 104 N. W. 433.

The Mississippi Statute authorizing the back assessment of property which has "escaped taxation" applies only to such as has not been assessed at all, not to the case when there has been in fact an assessment although on its face void, *Adams v. Luce*, 87 Miss. 220, 39 S. 418.

By Pub. Laws 1903, p. 33, c. 1101, abolishing school districts and providing for the taking by the towns of all property belonging to the districts, the total valuation of the property taken was to be estimated by the assessors of each town and a tax was then to be levied to pay for the property, and in those districts of the town where not as much as the average was expended for school property the taxpayers were to be taxed so as to make up the difference, and in districts where more than the average had been paid the tax payers were to receive a refund. When the assessors in valuing the school property omitted to include the property owned by one district and the taxpayers did not receive credit for the school property owned by their district, the tax was void, *Tefft v. Lewis*, 27 R. I. 9, 60 Atl. 243.

Taxes on land are not illegal because of the omission from the tax list of the district of large amounts of personal property, *Clark v. Lawrence County*, (S. D. 1907) 111 N. W. 558.

An allegation in a petition to list for taxation omitted land that the defendant's land was listed as from 500 to 600 acres, and there were according to the calculation of the county surveyor 637 acres, and according to the revenue agent 660 4-10

acres which "said agent claims to be correct", was not a sufficient allegation that there was more land in the tract than listed, *Commonwealth v. Chaudet*, (Ky. 1907) 100 S. W. 819.

Sec. 538. Assessment—On corporations—Railroads—Telephone and telegraph companies.

General Statutes. Real estate of corporations is taxed where situated by Conn. Acts 1907, Ch. 184, amending Gen. Stat. Sec. 2329, Annual reports of property owned and receipts from business done by corporations for the purpose of taxation are required by Del. Laws of 1906, Ch. 1, amending Ch. 166, Vol. 21 and Ch. 15, Vol. 22. For the general law taxing corporations see Ky. Laws of 1906, Ch. 22, Art. XI. The method of assessing taxes on all corporations except banks is prescribed by La. Acts 1906, No. 66. Gen. Laws, Ch. 24, Sec. 181, 182, 183, 185 and 190, taxing corporations is amended by N. Y. Laws 1906 Ch. 474. The taxation of corporations is regulated by Vt. Laws 1906 No. 36.

Railroad and other transportation companies. The method of fixing the value of railroad property is fixed by Alabama Laws of 1907 No. 329. Sec. 3915 of the Code of 1896, as amended by an act of Mch. 4, 1903, taxing sleeping car companies, is amended by Ala. Laws of 1907 No. 415.

Constitution of California art. 13, §10, providing for the assessment of the roadway of railroads by the state, was construed to allow the local authorities to assess the land used for switch yards, depots and cattle yards, and all other improvements erected on the right of way and property outside the right of way, *San Francisco & S. J. V. Ry. Co. v. C. of Stockton*, 149 Cal. 83, 84 Pac. 771.

Real estate of railroads, except rights of way, is made subject to taxation for public improvements by Conn. Acts 1907, Ch. 171.

Under Code Supp. Sec. 2033 a, b, and c, a company owning street railways in two cities and an interurban line connecting them but kept physically distinct is subject, as to its whole system, to the taxes levied on interurban lines, *Waterloo and C. F. Rapid Transit Co. v. Board of Sup'rs of Blackhawk County*, 131 Ia. 237, 108 N. W. 316. A telegraph line, owned by a railroad company and leased to another company for both railroad and commercial purposes is taxable under Code Sec.

1328, *Chicago, B. & I. R. Co. v. Rhein* (Ia. 1907) 112 N. W. 823.

In Kentucky railroads are assessed for taxation as entireties and all the property they are authorized or permitted to own or hold for the purpose for which they are created is grouped and valued irrespective of the legal title. 'A taxing officer should not be put to it to see whether each parcel of land actually occupied and operated by a railroad is owned by it, or whether each depot, turntable, repair shop or section house is on leased ground, or owned by the corporation in its own right, *Commonwealth v. Ingalls*, (Ky. 1905) 89 S. W. 156. Kentucky Statutes 4096-4104, inclusive, providing for the assessment for the purposes of taxation of railroad property, construed, *Blackwell v. Lewis* (Ky. 1906) 93 S. W. 40.

Art. 14 Sec. 11 of the Constitution, establishing the method of computing the rate of taxation, construed in its application to taxation of railroad, express and sleeping car companies, *Atty. Gen. v. State Board of Assessors*, 143 Mich. 73, 106 N. W. 698. Laws 1846 No. 42, 1848 No. 197, 1855 No. 139, incorporating a railroad company, taxing its capital stock, and making taxes a lien on the road, construed, *People v. Mich. Cent. R. Co.*, 145 Mich. 140, 108 N. W. 772. A steam railroad in the streets of a city leased to another steam railroad, is railroad property under Pub. Acts 1901, No. 173 and 1903 No. 45 and not subject to local taxation, *City of Detroit v. Detroit Manufacturers' R. R.* (Mich. 1907) 113 N. W. 365.

The assessment of railroad rights of way for levee purposes is provided by Mo. Laws 1907 p. 336.

Comp. Laws s. 1079 was construed as permitting a raise in the assessment of a railroad right of way which was changed from a narrow gauge to a broad gauge road before the first Monday in September, although it was regularly assessed as a narrow gauge on the first Monday in March, *State v. Carson & Colorado Ry. Co.*, (Nev. 1907) 91 Pac. 932.

Parlor car companies are taxed by N. H. Laws 1907 Ch. 91.

The taxation of railroad and canal property is regulated by N. J. Laws 1906 Ch. 82. Taxes assessed on railroad and canal companies, under provisions of act of March 27, 1888 are required to be assessed and paid in the district where the property is located by N. J. Laws 1906 Ch. 280. The taxation of street railway companies occupying public streets or other

public places is provided for by N. J. Laws 1906 Ch. 290. N. J. P. L. 1888, p. 285, as to taxation of railroad and canal property, construed, *In Re New York Bay R. Co.*, (N. J. 1907), 67 Atl. 513. Chapter 91 of the N. J. Laws 1905 being a supplement to N. J. P. L. 1905, p. 189 for the taxation of railroad and canal property, the so-called "Duffield Act" is constitutional, *Bergen and D. R. Co. v. State Board*, (N. J. Law 1907), 67 Atl. 668. Various recent New Jersey Statutes as to the taxation of railroad and canal property construed and held constitutional, *Central R. Co. v. N. J. v. State Board, of Assessors* (N. J. Law 1907) 67 Atl. 672., *United N. J. R. & C. Co. v. Parker*, (N. J. Law 1907), 67 Atl. 686. Under Act of 1888, (Gen. St., p. 3325, s. 214, subd. 4) the question whether a certain part of a railroad is the "main stem" and assessable depends on the use of it at the time, and when one line for freight traffic is longer than the other it is the "main stem" when there is no other characteristic by which to distinguish; *Mayor of Jersey City v. State Board of Assessors*, 73 N. J. Law 170, 63 Atl. 23. The term "main stem" as used in acts of 1884 and 1888 is defined by N. J. Laws 1906 Ch. 122.

Taxes are assessed on sleeping car companies by N. Mex. Acts 1907 Ch. 102. When a city levies a tax on the tracks of street railway companies at 25c per linear foot of track outside its car barns, etc., the tax is on the property of the company and not authorized by an act of the legislature authorizing the city to levy license taxes on street railroads and it is void, *Pittsburgh Ry. Co. v. City of Pittsburgh*, 211 Pa. 479, 60 Atl. 1077.

The taxation of railroads is regulated by South Dakota Laws 1907 Ch. 64.

Texas Acts 1905, p. 351, c. 146, the so-called intangible assets Act, providing for railroad taxation construed and held constitutional, *Missouri, K. & T. Ry. Co. v. Shannon*; *State v. Missouri K. & T. Ry. Co.* (Tex. 1907) 100 S. W. 138, 146

The taxation of railroads is regulated by Vt. Laws 1906, No. 37.

The taxation of railway and canal companies is provided for by Va. Acts 1906, Ch. 294.

The operating property of railroads is assessed by Wash. Laws 1907 Ch. 78.

Ch. 315 Laws 1903, changing the method of taxing rail-

road property, construed, *Chicago & N. W. Ry. Co. v. State*, 128 Wis. 553, 108 N. W. 557.

Where a foreign railroad corporation in possession as lessee of the railroad part of a railroad and toll bridge partly in Illinois, owned by a domestic corporation which operates the wagon roadways of the bridge, bought the bridge as authorized by Illinois Laws 1899, p. 116, the whole bridge could be assessed to the railroad by the state board of equalization as the railroad has the right to operate the whole bridge and county authorities could not assess the roadway parts of the bridge, *People v. Atchison T. & S. F. Ry. Co.*, 225 Ill. 593, 80 N. E. 272.

Telephone and telegraph companies. Manner of fixing value of property of long distance telephone and telegraph companies for taxation is prescribed by Ala. Laws of 1907, No. 329.

The rights of telephone, telegraph and tunnel companies to use certain tunnels in the streets of Chicago are assessable for taxation by the local assessors as real estate, *People v. Upham*, 221 Ill. 555, 77 N. E. 931.

In valuing a telegraph company the entire property considered as a whole, the value of its stocks and bonds and the amount of its earnings should be considered, *Western Union Tel. Co. v. Dodge County*, (Neb. 1907) 113 N. W. 805.

The taxation of the property of telegraph and telephone companies is provided for by So. D. Laws 1907, Ch. 64.

The taxation of telephone and telegraph companies is provided for by Va. Acts 1906, Ch. 294; of railway and canal companies by Ch. 300.

Water power companies. The real estate and machinery of private water companies are subject to local taxation by Mass. Acts 1907, Ch. 329. Acts 1883 No. 39 Sec. 14, amended by Acts 1899 No. 231, authorizing a tax on capital stock of corporations formed to furnish water power for manufacturing purposes, is constitutional, *Atty. Gen. ex rel. Beadle v. Arnott*, 145 Mich. 416, 108 N. W. 646.

Sec. 539. Assessment—Highway taxes. Various Illinois Statutes as to taxes for bridges and roads, and schools, construed, *St. Louis A. & T. H. R. Co. v. People*, 224 Ill. 155, 79 N. E. 664. The Illinois Road and Bridge Act as to taxation, construed, *Chicago &c. Ry. Co. v. People*, 225 Ill. 519, 80

N. E. 336. Hurd's Illinois Rev. St. 1905, c. 121, section 139 as to proceedings by a county collector to collect the road and bridge tax construed in connection with c. 120, section 276, of the same statute as to the taxation of omitted property, *Talbott v. Chicago & A. Ry. Co.*, 228 Ill. 102, 81 N. E. 813. Comp. Laws 1897 Sec. 4072, 4078 relative to money and labor taxes for maintenance of highways are construed in, *Perrizo v. Stephenson*, 141 Mich. 167, 104 N. W. 417. Tennessee Acts 1903 p. 815 c. 290 authorizing Marion county to issue bonds for the improvement of designated public roads, construed, *Pope v. Dykes*, 116 Tenn. 230, 93 S. W. 85.

Sec. 540. Assessment—Mortgages. Subdivision of Sec. 3911 of the Code as amended by an Act of March 4, 1903 relative to a privilege tax on mortgages and transfers in the nature of mortgages is amended by Ala. Laws of 1907, No. 345, Sec. 1. Pub. St. 1901, c 55, §7, cl. 5, relating to taxation was construed as applying to a party who loaned money and took the title to a farm giving his own bond to convey on payment of a stipulated price. He was liable for taxes on the amount so advanced as it was construed as a mortgage, although no note was given by the mortgagor who remained in possession, *Glidden v. Town of Newport*, (N. H. 1907) 66 Atl. 117. Mortgages are taxed by Minn. Laws. 1907, Ch. 328. Ch. 908, Art. 14 Laws 1896, taxing mortgages of real property, is amended in many details by N. Y. Laws 1906, Ch. 532. Gen. Laws, Ch. 24, Sec. 290 & 293 relating to the recording tax on mortgages are amended by N. Y. Laws 1907, Ch. 340. N. Y. Laws 1905, p. 2076, c. 729, providing for the taxation of real estate mortgages does not conflict with the State or Federal Constitution, *People v. Ronner*, 185 N. Y. 285, 77 N. E. 1061.

Sec. 541. Assessment—Growing timber. Sec. 437 Ch. 23 Code is extended to the assessment of standing timber by Va. Acts 1906 Ch. 50. Timber owned separately from the soil is taxed as personalty by Wash. Laws 1907, Ch. 108.

Sec. 542. Assessment—On mines and mining rights. The taxation of all mines and mining claims is provided for in detail by Ariz. Laws of 1907 Ch. 20. Where a lease was granted with rights to mine coal, and the privilege of extending

the lease until all coal had been exhausted it was a leasehold and taxable to its owners under Acts 1905 c. 35, p. 285. For a full discussion see, *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 53 S. E. 928.

Under Ballinger's Ann. Codes, ss. 1656, 1698, improvements on mining property such as boilers, engines, pumps, cars and tools may be assessed as real estate, and an assessment and sale thereunder as personal property is void, *Doe v. Tenino Coal & Iron Co.*, 43 Wash. 923, 86 Pac. 938. Laws of 1897, Chap. 244 (Gen. St. 1901, s. 7583), was construed as a part of the State's general tax law and to be enforced as such. When an owner of the mineral estate did not own the surface, the taxes on the minerals were separately assessable against him and subject to be sold for delinquent taxes, *Cherokee & P. Coal & M. Co. v. Board of Com'rs.*, 71 Kan. 276, 80 Pac. 601. Sess. Laws 1887, s. 1 was construed to render all mining properties liable to taxation whether they were patented, located, or application filed for patent, and a tax deed duly executed under which the purchaser took possession was not voidable 5 years or more after its execution, See *Mills Ann. St. s. 3902*, *Wood v. McCombe*, 37 Colo. 174, 96 Pac. 319.

Where the grantee of coal underlying lands wishes to have a transfer on the county tax list, he must under Ohio Rev. St. 1906, section 1025, present to the county auditor proper evidence of his title and the value of the coal as compared with the valuation of the whole lands as charged on the tax list. A written agreement between the grantor and grantee as to the division of the tax list valuation is not binding upon the auditor, *Dye v. State*, 73 Ohio St. 231, 76 N. E. 829.

Sec. 543. Assessment—On oil and gas rights. Kansas Laws 1897, c. 244, p. 456, relating to the assessment of mineral rights separately owned, was construed not to render a lessee liable for taxes on oil or gas beneath land to which he held a lease, granting him the right to "enter upon and operate for" gas and oil as the gas or oil did not become vested in the lessee as his own property until he separated the gas or oil from the land, *Kansas N. Gas Co. v. Board of C. of N. County*, 75 Kan. 335, 89 Pac. 750. Acts 29th Leg., p. 358, c. 148, imposing a tax on corporations and persons operating oil wells is constitutional, but the penalties therein imposed being disproportionate

to the amount of taxes, the court properly refused to enforce them, *Producers Oil Co. v. Stephens*, (Tex. Civil Appeals 1906) 99 S. W. 157. Acts 29th Leg., p. 364, c. 148, section 9, generally known as the "Kennedy Bill" imposing an occupation tax on wholesale dealers in petroleum products in addition to general taxes and a tax upon the owners of pipe lines, construed and held constitutional, *Texas Co. v. Stephens*, (Tex. 1907) 103 S. W. 481, *Southwestern Oil Co. v. State*, (Tex. 1907) 103 S. W. 489.

Sec. 544. Assessment—Irregularities and their effect—Remedies. Assessment liens, invalid by reason of certain informalities of procedure, are made binding by Conn. Acts 1907 Ch. 263, Sec. 17. The failure of the assessor or assistant to make at least one visit to each precinct to get tax returns as required by section 15, c. 4322 p. 16, Acts of 1895 of Florida does not make the tax assessment void, as the provision is merely directory; neither does the mere omission of the marks dollars and cents in the assessment on the assessor's books, where the owner is not thereby misled, *Reid v. Southern Development Co.*, (Fla. 1906) 42 S. 206.

The evidence of a deputy sheriff that he mailed a tax notice is sufficient to prove it when he remembers that he prepared and mailed notices to all delinquents and double checked them, although he cannot remember the particular notice, *Tie-man v. Johnston*, 114 La. 112, 38 S. 75.

Statutory remedies. If a tax is illegal and void its collector may be enjoined in equity; if simply irregular or erroneous the remedy by appeal is exclusive, *Security Savings Bank v. Carroll*, 131 Ia. 605, 109 N. W. 212. Florida Rev. St. 1892 section 1542 providing a summary remedy by petition to declare assessments on land not lawfully made applies only when the error appears on the face of the assessment roll. It is not coextensive with the remedy afforded by a court of equity, *Knight v. Matson*, (Fla. 1907) 43 S. 695. Florida Rev. St. 1892, section 1542 as to a proceeding to have an assessment of taxes declared not lawfully made, construed, *Louisville & N. R. Co. v. Board of Instruction*, 50 Fla. 222, 39 S. 480. Sec. 1373 of the code, providing for appeal from the board of review, for the correction of erroneous assessments, is amended by Ia. Laws 1907 Ch. 60. Ill. Laws 1905, p. 359, curing tax levies originally defective construed with *Hurd's*

Rev. St. 1903, c. 120, sec. 121, which provides that the county board shall determine the amount due at its September session and make a levy, *Bowyer v. People*, 220 Ill. 93, 77 N. E. 91. Kentucky Statutes 1903 section 4250 as to erroneous assessments of taxes construed together with sections 4021, 4053, and 4056 declaring taxes a lien, *Garrett v. Creekmore*, (Ky. 1905) 89 S. W. 166.

Sec. 545. Lien for taxes—Existence and duration.

A county levied a tax in 1904 to pay for the erection of a courthouse, but suspended the collection of part of it. In 1906 the county had a right to collect the balance of the tax and a resolution to that effect was not a new tax levy and void, *Johnson v. Pinson*, 127 Ga. 144, 56 S. E. 238. Tax liens, privileges, and mortgages for the years 1870 to 1876 securing the payment of taxes due New Orleans for those years lapse within three years of the adoption of the Louisiana Constitution of 1898, Section 186 therefore does not violate the Constitution of the United States, *Rousset v. New Orleans*, 115 La. 551, 39 S. 596.

Sec. 975 of the code making delinquent taxes a lien is amended by Ia. Laws of 1906, Ch. 31. Kansas Laws 1901 c. 392, p. 705, relative to liens for delinquent taxes, was construed, *Douglass v. Board of C. C. of L. County*, 75 Kan. 6, 88 Pac. 557. Sec. 969 Rev. Laws 1905, providing for liens on land, held under invalid sales for taxes, to cover taxes, penalties, interest and costs, construed, *Jenks v. Hemmingsen*, (Minn. 1907) 113 N. W. 903. Taxes assessed for street sprinkling are made liens by N. Mex. Acts 1907 Ch. 31 Sec. 3. The creation, regulation and collection of municipal liens are provided for by Pa. Laws 1907 No. 70; as to collection, see also No. 36. Liens for sidewalks and curbstone assessments are established by Pa. Laws 1907 No. 72, for tree-planting by No. 251. The time limits for the enforcement of liens for claims for taxes and other assessments are designated by Pa. Laws 1907 No. 107. The allowance of liens for taxes, method of preserving them and of enforcing payment are regulated by Pa. Laws 1907 No. 213. Sec. 2597 Rev. Stat. 1898, making taxes a lien on real property as of the second Monday in January, amended, Utah Laws 1907 Ch. 2.

Laches. A city may lose its right to enforce a tax lien by laches, but a delay of five years did not constitute laches when

the purchaser could have learned of the claim by application to the proper city official, *Seibert v. Louisville*, (Ky. 1907) 101 S. W. 325.

Sec. 546. Payment of taxes—In general—Effect of—On land of another—Compromise. In an action to confirm a tax title the evidence was examined and held to show the defendant had paid the taxes, *Stevenson v. Reed*, (Miss. 1907) 43 S. 433. *Wilson's Rev. & Ann. St. 1903 of Oklahoma*, sec. 101, art. 10, c. 75, relating to the time the taxes become delinquent, was construed, *Norton v. Choctaw, O. & G. Ry. Co.*, 16 Okl. 482, 86 Pac. 287. As to payment of taxes levied for the building of public roads see *Ark. Acts of 1907 No. 144*. Payment of taxes pending appeals to the Board of Equalization is provided for by *N. J. Laws 1906 Ch. 9*. Tax receipts are the best evidence of the payment of taxes, and the record of tax receipts which the law requires the tax collector to keep is merely secondary evidence, *Hardie v. Bissell*, 80 Ark. 74, 94 S. W. 611.

A purchaser at a tax sale, whose duty it is to pay the taxes, by the purchase merely pays them, the title being left as if payment had been made before the sale, *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997.

A railroad entered into a contract with the road supervisor by which he should see that the taxes assessed against the railroad were worked out as the statute permitted. The supervisor fraudulently made out a certificate that the work had been done and the railroad obtained a refund on the money loaned, but the county had a right to a return of the money on discovery of the fraud, and the statute of limitations did not begin to run against the county until the money was refunded and the fraud detected, *Walla W. County v. Oregon R. & Nav. Co.*, 40 Wash. 398, 82 Pac. 716.

Payment by compromise. When the county commissioners have entered into a contract to accept a reduction of taxes in consideration for dropping a suit and the commissioners retain the consideration, they cannot rescind the contract where no fraud is shown, and the settlement is also binding concerning a part of the taxes due a municipality, See *B & C. Comp. s. 912, subd. 10, 913, 2518*, *Multnomah County v. Title Guarantee Trust Co.*, 46 Ore. 523, 80 Pac. 409. Sec. 4 Art. 9 Constitution of Nebraska, prohibiting commutation for taxes

held not to apply to special assessments levied upon the property to be benefited by local improvements and so not to prohibit the compromise of a suit to collect such assessment, *Farnham v. City of Lincoln*, (Neb. 1906) 106 N. W. 666.

Where there are two assessments of the same lands to different persons for the same year, and payment of the taxes is made by one under his assessment, the lien for the taxes is wholly discharged, and no collection of taxes under the other assessment can be made, Pickler v. State, (Ala. 1907) 42 S. 1018.

Payment of taxes on land of another. One who unsolicited, and with no interest of his own to protect and no obligation to do so, pays the taxes due on the lands of another is a mere volunteer, and acquires thereby no rights as against the owner, *Burkham v. Manewal*, 195 Mo. 500, 94 S. W. 520. Where one pays the taxes on land for a long period of time, without claiming right or title, allows it to become delinquent for one year, does not take a deed under purchase, but continued to pay taxes in the name of the owner, his agency is sufficiently established, and a deed taken by the heirs of such agent after his death vests no title in them against the one for whom taxes were paid, *Siers v. Wiseman*, 58 W. Va. 340, 52 S. E. 460. Where M owned the rear of a lot and C the front portion but the assessors taxed the front part to M and the rear to C, and M in good faith, being misled by the assessment, paid the taxes actually assessed to him, his payment must be considered as on account of the part he really owned. A taking of the rear portion therefore for the non-payment of the whole tax was void, *Hurd v. Melrose*, 191 Mass. 576, 78 N. E. 302.

Effect of payment on subsequent sale. Where land assessed to S. was sold by him to W and mortgaged to B and then sold for taxes, but neither S, W, nor B were given the statutory notice to redeem, and before the sale W paid the tax and received a receipt therefor, the purchaser at the tax sale could not recover the premises from W, *Towry v. Wax*, (Miss. 1906) 42 S. 536. A purchaser at a void tax sale, the real owner while in possession having paid the taxes, who in a bill to set aside such sale disclaimed all interest in the land upon the ground of a subsequent conveyance, but nevertheless filed a demurrer and in other ways caused the plaintiff needless costs, was not entitled to reimbursement for the amount he paid on the purchase and was in addition properly charged with the

costs of suit, *Glos v. Shedd*, 218 Ill. 209, 75 N. E. 887. A purchaser at a tax sale of land gets no title where the sale is made through a mistake of the collector in attempting to assess to the record owner of land taxes already paid by the true owner, *Wood v. Smith*, 193 Mo. 484, 91 S. W. 85.

Where an owner tenders the tax collector the full amount of taxes due on his land and is told that they have already been paid and shown a written list on which it so appeared, a later sale for such taxes is void, *Brannon v. Lyon*, 86 Miss. 401, 38 S. 609.

By one co-tenant. Five people were interested in a tract of land as co-tenants in the oil and gas rights and as owning the fee respectively, and two of them did not pay their proportion of the taxes assessed to them, but their three co-tenants paid their taxes, and the court held that such payment invalidated the sale of the shares of the other two for non-payment of taxes, *Snodgrass v. Jolliff*, 59 W. Va. 292, 53 S. E. 151.

Sec. 547. Recent statutes as to collection of taxes by sale and otherwise.

Alabama. Various Alabama Statutes as to tax sales and the right to redeem therefrom, construed, *Crebs v. Fowler*, (Ala. 1906) 42 Southern 551.

Arkansas Acts 1887 p. 63 as to tax sales construed, *Hall v. Potter*, 81 Ark. 476, 99 S. W. 687. Kirby's Arkansas Digest Section 7086 with regard to tax titles construed, *Earle Improvement Co. v. Chatfield*, 81 Ark. 206, 99 S. W. 84. Kirby's Arkansas Digest section 7085 and ff as to the publication of delinquent tax lists by the county clerk, construed, *Cook v. Ziff Colored Masonic Lodge*, 80 Ark. 21, 96 S. W. 618. Arkansas Laws 1881, p. 62 as to commissioner's sales for taxes construed, *St. Louis I. M. & S. Ry. Co. v. Greeson*, 81 Ark. 170, 98 S. W. 728.

Connecticut. Irregularities in the proceedings of assessors, boards of relief, and selectmen in the assessment and collection of taxes are made valid by Conn. Acts 1907, Ch. 263, Sec. 1-3. Notices of filing of certificates with town clerks that the collector desires to continue tax liens are required to be given to the holders of record titles by Conn. Acts 1907, Ch. 266.

Delaware. The Governor may appoint agents to collect state

taxes from delinquent corporations, Del. Laws of 1906, Ch. 2. The Recorder of Deeds in New Castle County is required to make a record of the purchaser of land at a sale for non-payment of taxes by Del. Laws of 1907, Ch. 98.

Iowa. Sec. 902 of the code relative to payment to cities and towns of taxes collected by county treasurer amended by Ia. Laws 1906 Ch. 29. As to manner of collecting road taxes see Ia. Laws 1906, Ch. 58, amending Sec. 1533 & 1540—a of the Suppl. to Code. Actions at law by county treasurer, for collection of taxes are authorized by Ia. Laws 1907, Ch. 62. Sec. 2439 of the Code, providing for sales of land for non-payment of taxes, is amended by Ia. Laws 1906, Ch. 99. As to officers authorized to collect delinquent taxes see Ia. Laws 1906 Ch. 53, amending Sec. 1407 of the Code.

Kentucky Gen. St. c. 92, art. 16, sec. 2, which required non-resident owners of the county to file a list of land for taxation; art. 4, sec. 1 as to the form of tax book; art. 8, sec. 17, as to the description in sales for taxes; and the so-called auditor's agent act giving a purchaser all the title of the person assessed, construed together, *Husband's v. Polivick*, (Ky. 1906) 96 S. W. 825.

Louisiana. Various Louisiana Statutes as to the notice required to be given to owners before land is sold for a tax delinquency, construed, in re. *Interstate Land Co. v. Doyle*, 118 La. 587, 43 S. 173.

Maine. Publication of names of delinquent tax payers in annual municipal reports is required by Me. Laws 1907, Ch. 166. The time within which taxes must be paid to prevent sale of land for non-payment is extended by Me. Laws 1907, Ch. 173, amending Rev. Stat. Ch. 19, Sec. 73. See also Me. Laws 1907, Ch. 72, not applying to cities of 15,000 or more inhabitants.

Michigan. Laws 1893 No. 206, as amended by Laws 1897 No. 24 and 1899 No. 107, providing for payments to the Auditor General of all delinquent taxes on lands taken as homesteads held not applicable to lands taken by the state, *Morse v. Auditor General*, 143 Mich. 610, 107 N. W. 317.

Minnesota. The collection of delinquent road taxes is provided for by Minn. Laws 1907 Ch. 285. Sec. 936 & 937 Rev. Laws, requiring making of lists of lands to be sold for taxes and prescribing manner of selling are amended by Minn. Laws 1907 Ch. 430.

Mississippi Laws, 1878, p. 45, c. 3, section 39 which provides for tax sales does not permit a sale in lump of several distinct and separate tracts, assessed at different sums and to different unknown owners, *Morris v. Myer*, 87 Miss. 701, 40 S. 231.

Montana. The officers to collect taxes, the manner of collection and sale of land for non-payment are prescribed by Mont. Laws 1907 Ch. 24.

New Jersey. As to execution of powers of taxing officers, see N. J. Laws 1906 Ch. 4. Reduction of interest is permitted, if records are lost, by N. J. Laws 1906, Ch. 66. The manner of selling land, as set forth in Sec. 52 of act of April 8, 1903, is further regulated by N. J. Laws 1906, Ch. 207. Certain details relating to searches and notices under provisions of the Act concerning the settlement of unpaid taxes approved May 18, 1898 are regulated by N. J. Laws 1906 Ch. 265.

New Hampshire. Purchasers at tax sales are required to notify mortgages by N. H. Laws 1907 Ch. 120, amending Ch. 61 Sec. 8 P. S.

North Dakota. Ch. 67 Laws 1897, the "Woods Law," regulating tax sales, construed, *Nind v. Myers*, (N. D. 1906) 109 N. W. 335; *State Finance Co. v. Beck*, (N. D. 1906) 109 N. W. 357.

Oregon. Sec. 2847 Rev. Stat., regulating the payment of taxes by persons other than the owners of the land assessed, is amended by O. Laws 1906 p. 285.

Pennsylvania. Township tax collectors, in townships of the first class, are superseded by township treasurers by Pa. Laws 1907 No. 210. Commissions on taxes collected by the attorney general or attorneys employed by him are permitted by Pa. Laws 1907 No. 278.

South Dakota. Laws 1891 c. 14 sec. 106, prescribing the manner in which the treasurer shall offer lands to be sold, construed, *King v. Lane*, (S. D. 1907) 110 N. W. 37.

Tennessee Statutes 1899, p. 1136, c. 435 section 55 requiring certificated lists of tax sales to state the day of sale, etc., construed, *Hamilton v. Brownsville Gaslight Co.*, 115 Tenn. 150, 90 S. W. 159. Tennessee Acts 1899, p. 130, c. 435, s. 43 providing that all taxes collected thereunder shall be payable at a certain date, construed, *Rucker v. Hyde*, (Tenn. 1907) 100 S. W. 739. Tennessee Acts 1879, p. 69, which provides for a clerk's deed to any person redeeming lands during a second

year after delinquency for taxes, is unconstitutional, because it authorizes appropriation of delinquent lands to the payment of taxes without due process of law, *Mason v. Gates*, (Ark. 1907) 102 S. W. 190.

Texas. Various Texas Statutes as to tax sales construed, *Rogers v. Moore*, (Tex. 1906) 97 S. W. 685.

Utah. Sec. 2655 Rev. Stat. 1898, as amended by Ch. 76 Laws 1905, providing for the sale at auction, of property taken for non-payment of taxes and the disposition of the proceeds, amended by Utah Laws 1907 Ch. 49.

Virginia. Sec. 603 Code, relative to duties of county treasurer in collecting taxes, amended by Va. Acts 1906 Ch. 41. Sale by the Commonwealth, of lots purchased for taxes and unredeemed for 4 years is directed by Va. Acts 1906 Ch. 52.

Washington. The limitation of actions for collection of special assessments for local improvements is fixed by Wash. Laws 1907 Ch. 182.

Wisconsin. Rev. St. 1898 Sec. 1047, 1187, 1191 & 3087, relative to proceedings on sale of land for taxes, construed. *Van Ostrand v. Cole*, 131 Wis. 446, 110 N. W. 891. St. 1898 Sec. 652, 653 and 1193 relative to sales of real estate taken by counties for taxes, construed, *Pinkerton v. Fenelon*, 131 Wis. 440, 111 N. W. 220.

Sec. 548. Validity of various proceedings for collection. Kirby's Arkansas Digest sections 661-675 authorizing proceedings to confirm a tax sale, construed, *Updegraf v. Marked Tree Lumber Co.*, (Ark. 1907) 103 S. W. 606. Inclusion of printer's fee, where no affidavit, *Cole v. Van Ostrand*, 131 Wis. 454, 110 N. W. 884.

B. & C. Comp. s. 3118, 245, 1014, relating to the return of the warrant against delinquent property and a written return of an execution as required, was construed, *Ayers v. Lund*, (Ore. 1907) 89 Pac. 806. Laws 1899, p. 285, c. 141, permitting the foreclosure of the certificates after three years time, was construed, *Allen v. Peterson*, 38 Wash. 599, 80 Pac. 849.

A county collector's sworn report of delinquent lands, together with the proof of publication, and notice of the application for judgment, makes a prima facie case, and judgment must be entered thereon unless good cause is shown to the contrary, *Weimers v. People*, 225 Ill. 82, 80 N. E. 68. Laws

of 1899, p. 299, c. 141, s. 18 was construed to allow other defenses presented in writing to a foreclosure of property on a certificate of delinquency in addition to any defense as a result of the levy and sale, *Solberg v. Baldwin*, (Wash. 1907) 89 Pac. 561. Pol. Code, s. 3885 making all assessments of taxes valid although there were informalities in the assessment was construed, *Miller v. Kern County*, (Cal. 1907) 90 Pac. 119. Laws 1903, c. 75, sec. 26, relative to purchase of certificates of tax sales owned by the state, construed, *State v. Fink*, (Neb. 1905) 104 N. W. 1059.

Sheriff's return. A sheriff, selling land for taxes is not required in the return of sales to certify that it was necessary to sell the whole or that he offered for sale an amount less than the whole; when the entire lot has been sold it will be presumed that a sale of it was necessary, *Duerr v. Snodgrass*, 58 W. Va. 572, 52 S. E. 531.

Demand. A postal card from the tax collector stating the amount due, for what, from whom and to whom due, and where and when to be paid, although not dated was a sufficient notice within Rev. Laws, c. 13, Sec. 3, *Amherst College v. Assessors*, 193 Mass. 168, 79 N. E. 248.

Sec. 549. Actions to collect taxes. Missouri Revised Statutes 1899 section 9303 which provides that actions to recover taxes shall be prosecuted against the owner of the property, construed, *Harrison Machine Works v. Bowers*, 200 Mo. 219, 98 S. W. 770. In a suit to enforce payment of delinquent taxes the burden is on the defendant to prove lack of authority to act on the part of the officers of the city, *State v. Several Parcels of Land*, (Neb. 1907) 113 N. W. 810.

When a delinquent tax payer has personal property it must be levied on and sold before the land is sold as forfeited lands, under Act of 1880 (17 St. at large, p. 380) ss. 9, 10 and if a purchaser buys the tax deed at a sale held before the personal property has been sold it is null and void, *Johnson v. Jones*, 72 S. C. 270, 51 S. E. 805.

In an action to collect a tax on land which has already been taken by a railroad in condemnation proceedings before the same court, in which proceeding the value of the land has been paid into court, the Court has power to order the clerk to retain out of the fund in his hands the amount claimed to be

due, to await the determination of the tax suit, *St. Paul M. & M. Ry. Co. v. Blakemore*, (N. D. 1908) 114 N. W. 731.

It is no defence to an action against a husband and wife for a tax assessed on their joint interest as mortgagees that the tax should have been levied on each interest separately, *City of Detroit v. Jacobs*, 145 Mich. 395, 108 N. W. 671.

Sec. 550. Tax sale—Notice of. Code Sec. 1441, prescribing the manner of making service of notice of sale for non-payment of taxes, construed and held to be mandatory, *Grimes v. Ellyson*, 130 Ia. 286, 105 N. W. 418. Comp. Laws. Sec. 3959 and 3962, requiring notice to the owner of land sold for taxes as a prerequisite to the recovery of possession under the tax deed, construed, *Briggs v. Gulich*, 143 Mich. 457, 107 N. W. 269. Sec. 10, 650 Cobbe's Ann. St. 1903, providing for notice of sales, construed, *State v. Cronin*, (Neb. 1906) 106 N. W. 986.

To whom. 1. Ballinger's Ann. Codes & St. §1767, and Laws 1897, p. 182, c. 71, §96 amended by Laws 1899, p. 296, c. 141, §13 were construed as requiring only notice to the owners of record, and parties holding the property under claim of right adversely to the owners were not entitled to notice of the foreclosure of the tax deed, *Rowland v. Eskland*, 40 Wash. 253, 82 Pac. 599.

Name. Sess. Laws 1901, p. 384, c. 178, §1, providing that the name of the owner must be inserted in the summons of a proceeding to foreclose land for non-payment of the taxes, was construed as rendering the proceedings void when the name of the owner was correctly shown in the tax record and was not inserted in the notice, although the summons would have been valid if the owner had been unknown, *Anderson v. Turate*, 39 Wash. 155, 81 Pac. 557. Laws of 1901, p. 385, c. 178, s. 3, relating to the foreclosure of property delinquent for taxes, construed, and the notice of such foreclosure was construed to be sufficient when the property was advertised under a name of an owner not shown by the most recent assessor's books to be the owner of the property, and when no other notice was given a sale under such circumstances was valid, *Spokane Falls & Northern Ry. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192.

Publication. 2 Ballinger's Ann. Codes & St., §§4882, 4878, relating to proof of a service by publication of a notice

of a tax sale, was construed, *Warner v. Miner*, 4 Wash. 98, 82 Pac. 1033. Under the statute requiring tax sales to be advertised for 30 days there must be one insertion each week during that time and an advertisement after the time set for the sale, though the sale is postponed until after the issue appears, does not satisfy the statute, *In re Lindner*, 113 La. 772, 37 So. 720. Where the proceedings in a tax sale were regular except that the sheriff made a mistake in advertising the land as the property of "J. A. Bowers" instead of "J. A. Rogers" it was held that the sale was voidable only, not void, and Rogers was under a duty to tender back to the purchasers the full amount of their bid, *Moore v. Rogers*, (Tex. 1907) 99 S. W. 1023.

A description of lands in a notice of tax sale is not fatally defective when it gives 9.44 acres as 944 acres with a correct reference to subdivision, plat and county records where the land was recorded, Jackson v. Mason, 143 Mich. 355, 106 N. W. 1112. Where a warning order describing lands proceeded against for overdue taxes failed to describe the particular tract, the subsequent proceedings and sale thereof were void, *Foohs v. Bilby*, (Ark. 1907) 103 S. W. 386.

Time. A tract of land was listed for taxes on April 4th and sold May 1st, of the same year. Under Acts 1897, p. 268, c. 169, par. 51, the sheriff was required to personally serve notice of a tax sale on the delinquent taxpayer or his agent at least 30 days before the sale if he resides in the state or is a non-resident to notify him by mail and by publication of notice once a week for four successive weeks in his county newspaper, therefore the purchaser did not acquire title, *Matthews v. Fry*, 143 N. C. 384, 54 S. E. 379.

Sec. 551. Tax sale—Setting aside—Remedy—Conditions—Defences—Statutes. Kentucky Statutes 1903 section 4036 as to the lien of a purchaser of land at a tax sale which is later set aside on account of an irregularity, construed, *Jones v. Loville*, (Ky. 1906) 97 S. W. 390. Missouri Laws 1903 pp. 254, 255 as to suits to set aside tax deeds construed, *Manwarring v. Missouri Lumber & Mining Co.*, 200 Mo. 718, 98 S. W. 762. Sec. 1263 Rev. Codes 1899, providing the conditions under which a tax sale may be set aside, construed, held constitutional, and applicable to a sale for road taxes, *Beggs v. Paine*, (N. D. 1906) 109 N. W. 322.

In equity. Under Laws 1903, Act 236, Sec. 141, providing for the payment of taxes on land sold for non-payment the court of equity may give relief where land has been sold twice, *Miller v. Steele*, 146 Mich. 123, 109 N. W. 37. Where an unwarranted action for the sale of land is brought by the county, and the county treasurer fails in his duty to notify the owner of the proceedings, the owner may have relief in equity against the original purchaser while the land is in his possession, *Squire v. McCarthy*, (Neb. 1907) 112 N. W. 327.

Delay. Public Acts 1903 No. 84 does not help the owner of land who has allowed it to be taken by the state for non-payment of taxes for 20 years and attempts to have a decree for its sale set aside after the expiration of 12 years, *Owens v. Auditor General*, 147 Mich. 683, 111 N. W. 354. Under Comp. Laws Sec. 3957 & 3921, a purchaser who obtains from a county treasurer a certificate that there was no tax deed executed within 5 years cannot have a tax sale which took place 9 years before set aside, *Welever v. Auditor General*, 143 Mich. 311, 106 N. W. 736.

Lack of notice. Under Acts 1893 No. 206 Sec. 98 & 143 and 1901 No. 128 a purchaser who receives no notice that his land has been sold for taxes until 6 months after the sale is entitled to have the sale set aside, *Jakobowski v. Auditor General*, 144 Mich. 46, 107 N. W. 722. Under Sec. 10, 644-10, 691 Cobby's Ann. St. 1903 it is not sufficient ground to vacate a decree on default in an action to foreclose delinquent taxes that the owner was a non-resident and had no notice, *State v. Several Parcels of Land*, (Neb. 1906) 106 N. W. 663.

Tender and payment of taxes paid by purchaser at tax sale. Missouri Act March 6, 1903 as to refunding taxes by the plaintiff in a suit to set aside a tax title construed, *Haarstick v. Gabriel*, 200 Mo. 237, 98 S. W. 760. To secure relief from an invalid tax sale a party must pay the face amount of all just taxes with interest from the day of sale, *State Finance Co. v. Beck*, (N. D. 1906) 109 N. W. 357, *Powers v. First Nat'l Bank of Bottineau*, 15 N. D. 466, 109 N. W. 361, *Fenton v. Minn. Title Ins. & Trust Co.*, 15 N. D. 365, 109 N. W. 363. Where an owner does not complain about the amount of a tax, but claims that a certain tax sale is void on account of a technical error in the description of the land, he must first

do equity by offering to pay the amount equitably due, *Couts v. Cornell*, 147 Cal. 560, 82 Pac. 194.

Possession taken of land in the morning by fencing it in and putting up a sign "for sale, apply to the possessor's attorney," was sufficient to maintain a bill to set aside certain tax deeds filed in the afternoon of the same day, *Glos v. Davis*, 216 Ill. 532, 75 N. E. 208.

Costs. Where, in a proceeding to set aside a tax deed and a quitclaim deed the holder of the quitclaim is represented by counsel who refuses to accept a tender of the amount due such holder the money having been brought into court the holder may be required to pay a part of the court costs proportionate to her interests in the premises, *Glos v. Garrett*, 219 Ill. 208, 76 N. E. 373.

Confederate taxes. Although taxes levied by Mississippi in 1861 and 1862 in support of the confederacy were void and illegal they were levied by a de facto government and to support a sale for unpaid taxes cannot be treated as if they were never in fact paid, *Day v. Smith*, 87 Miss. 395, 39 S. 526.

By state. The Auditor General may cancel a deed of land sold by the state for taxes, *Heyward v. Auditor General*, 147 Mich. 591, 111 N. W. 190. When a sale of land, taken by the state for non-payment of taxes, has been made the state cannot subsequently annul the records and cancel the sale, on the ground that the prior sale for taxes was improperly made, *Auditor General v. Clifford*, 143 Mich. 626, 107 N. W. 287.

Sec. 552. Tax sale—Rights of purchaser. A claim based on a tax sale which ripens into a title under a tax deed cuts off all prior claims to the land, *Cole v. Van Ostrand*, 131 Wis. 454, 110 N. W. 884. A tax sale, in the absence of special legislation to the contrary, is subject to the rule of caveat emptor. And in case of eviction the buyer has no recourse against the municipality under whose authority the sale was made, *Lindner v. New Orleans*, 116 La. 372, 40 S. 736.

Where a tax collector obtained a judgment for back taxes against the record owner of land assessed although both the collector and the buyer at the sale under the judgment knew of an unrecorded deed of the land, the purchaser took no title as against the grantee in such deed, *Stuart v. Ramsey*, 196 Mo. 404, 95 S. W. 382.

Pub. Acts 1897 No. 229 providing for writs of assistance for possession of land bought at tax sales, construed, *Williams v. Olson*, 141 Mich. 580, 104 N. W. 1101.

The daughter of a former owner sought to set aside the tax deed of a valuable tract of land, on the ground that the purchaser was the agent of the former owner, continuing the relations of agent with the daughter who claimed that the purchase of the land at the tax sale by him should be a purchase for her. The burden of proof was on the party seeking to set the sale aside, *Day v. Fay*, *State v. Day*, 59 W. Va. 65, 52 S. E. 1013.

Lienors. Where sellers of land who held a vendor's lien bought it in at a tax sale the purchase amounted only to a payment of the taxes, *Osceola Land Co. v. Henderson*, 81 Ark. 432, 100 S. W. 896.

Bona fide purchaser. When a person acquired title to land in 1885 and paid taxes thereon up to 1900, it being assessed to him, but never recorded his deed until after a sale made to an innocent third party upon a judgment for taxes brought against the record owner the innocent purchaser must prevail over the true owner. The fact that the tax collector's attorney acted in bad faith in bringing the suit when he knew the taxes had in fact been paid is immaterial as far as the innocent purchaser is concerned, *Evarts v. Missouri Lumber & Mining Co.*, 193 Mo. 433, 93 S. W. 372.

A second tax deed to the holder under the first does not affect the title already acquired; the interest under each deed may "stand as the foundation of a grant," *Patterson v. Cappon*, 129 Wis. 439, 109 N. W. 103.

Against unrecorded tax deed. Where in 1888 the sheriff sold land upon a judgment for the taxes from 1879 to 1885 but executed no deed till September 23, 1891, and meanwhile judgment was obtained against the original record owner for the 1887 and 1888 taxes, and on September 21, 1891, the sheriff executed a deed to other purchasers upon a sale to satisfy the second judgment it was held that the claimants under the September 21 tax deed must prevail, *Charter Oak Land & Lumber Co. v. Bippus*, 200 Mo. 688, 98 S. W. 546.

Subsequent sale for prior taxes. A title acquired under a tax sale may not be impeached by the state by a resale of the land for taxes due and unpaid for prior years, *Gates v. Keigher*, 99 Minn. 138, 108 N. W. 860. Under Ch. 11 Gen.

Stat. 1878 and 1894 "the purchaser of a tax title may be required to protect his interest not only as against all subsequent taxes, but also against anterior taxes and a tax title based on a sale under a later tax may prevail over a later tax sale on an earlier tax lien," *Oakland Cemetery Ass'n v. Ramsey County*, 98 Minn. 404, 108 N. W., 857, 109 N. W. 237.

Against prior mortgage. Claimants under a tax sale regularly conducted hold paramount to a prior mortgage and are not proper parties defendant in an action to foreclose the mortgage, *Erie County Savings Bank v. Schuster*, 187 N. Y. 111, 79 N. E. 843.

Effect of sale on easement. A right of way was granted over a private alley way to the grantee but when the grantor did not pay the taxes on the property the city might sell it for non-payment of the taxes, extinguishing the easement of the grantee in the property, *Hill v. Williams*, 104 Md. 595, 65 Atl. 413.

Sec. 553. Tax sale—To state. In Louisiana when land has vested in the state for non-payment of taxes the municipality cannot seize and sell it to pay its own local taxes, *Lindner In Re*, 114 La. 895, 38 S. 610. When the State becomes the owner of land on account of the failure to pay taxes and holds the land for five years, it may sell it to the highest bidder according to Pol. Code of California §3897 and the State does not have to return to the owner any excess realized at the sale above the amount due, *Fox v. Wright*, (Cal. 1907) 91 Pac. 1005. As, in an action by a landowner against the commissioner of the land office and the comptroller of the State to have deeds executed to the State by the Comptroller upon a sale for taxes declared void, the State is a necessary party, the action cannot be maintained in the absence of statute, *Sanders v. Saxton*, 182 N. Y. 477, 75 N. E. 529. Sec. 127-131 Gen. Tax Law of 1897, providing that the failure to pay taxes and redeem or purchase lands sold to the state for taxes, where there is no occupation, shall be prima facie evidence of abandonment by the owner, and making such lands subject to homestead entry only, with the amendment of 1899 (Act No. 107), construed, *Meagher v. Dumas*, 143 Mich. 639, 107 N. W. 701.

Sec. 554. Tax sale—Irregularities sufficient to avoid—Tax lists.

Date. A sale of land to the state for taxes under Mississippi Laws 1863 p. 111, c. 7 made on a day later than that fixed by the statute, there being no adjournment of sales from day to day, was void, *McLemore v. Anderson*, (Miss. 1907) 43 S. 878. As Mississippi Laws 1875 p. 49 c. 24 require a sale of land for back taxes to be made in February a sale held in May is void. Land so sold can never be held by virtue of the application of any of the statutes of limitation enacted in protection of tax sales, *Kennedy v. Sanders*, (Miss. 1907) 43 S. 913.

Value or amount of property sold. Under Mississippi Ann. Code 1892 section 3813 requiring land sold for taxes to be offered in 40 acre lots a sale of an undivided one-half interest in an 80 acre lot is illegal, *Stevenson v. Reed*, (Miss. 1907) 43 S. 433. The sale of a factory assessed for \$8,000 for a tax of \$200, when the title of the plaintiffs was acquired after the assessment and there were machines which might have been taken to satisfy the tax, will be set aside, *Starr v. Shepard*, 145 Mich. 302, 108 N. W. 709. Under Mass. Rev. Laws, c. 13, section 41, providing that the tax collector shall sell the smallest undivided part of the land which will satisfy the taxes a sale by him of a part of the lot by metes and bounds is invalid, *Roberts v. Welsh*, 192 Mass. 278, 78 N. E. 408.

Tax list defective. Where the original delinquent list has its title pasted over with heavy pasteboard so that only the words "non payment of taxes thereon for the year 1900" appear, and the heading is only readable by raising the card-board by unusual effort it is a vital defect and avoids a subsequent sale for taxes and a tax deed, *Metz v. Starcher*, 60 W. Va. 657, 56 S. E. 196. Where publication of the delinquent tax list is defective the purchaser gets no valid tax title and the statute of limitations does not run in his favor, *Holmes v. Loughren*, 97 Minn. 83, 105 N. W. 558. The description of property in a delinquent tax list as located in "Sherman & Kritz's Roseland Park Addition to Pullman" and in the notice as "Herman & Kritz's Roseland Park Addition to Pullman" constituted a fatal variance, although there was only one addition of the name mentioned in the delinquent list and no such addition as that named in the notice, *Smythe v. People*, 219 Ill.

76, 76 N. E. 82. Hurd's Illinois Rev. St. 1905, c. 120, section 194, as to the county clerk's certificate of delinquent taxes, construed, McCraney v. Glos, 222 Ill 628, 78 N. E. 921. A tax collector cannot remedy a defective description on the assessment roll by voluntarily inserting a different description in the deed which he executes to the purchaser, Gibbs v. Hall, (Miss. 1905), 38 S. 369.

Officers not qualified. Where it did not appear that any person was legally elected or qualified as tax collector of a plantation or that the assessors made any proper record of the assessment the subsequent tax sale was void, Baker v. Webber, (Me. 1907) 67 Atl. 144. The receiver of tax returns under Pol. Code 1895, §821 is the only one who is authorized to issue executions for taxes against unreturned wild lands; therefore an execution on unreturned wild lands and the subsequent sale thereof is void if made out by the Tax Collector, Barnes v. Carter, 120 Ga. 895, 48 S. E. 387. Where a levy is made on property previous to a tax sale by a magistrate's constable, who is not proved to be appointed as deputy sheriff under Civ. Code 1892, Sec. 832, a tax deed given at the sale is null and void, Barrineau v. Stevens, 75 S. C. 252, 55 S. E. 309.

Sec. 555. Tax sale—Irregularities insufficient to avoid. Failure of town treasurer to sign statement of unpaid taxes and addition of 5% collection fee irregularly are held not to be fatal defects in the proceedings by Cole v. Van Ostrand, 131 Wis. 454, 110 N. W. 884.

Tax list defective. A description of property in a tax valuation list by number, designation of the lot, and amount of square feet, is sufficient. The use of the word "about" in a tax deed before the words "sixty-five feet" creates no uncertainty Roberts v. Welsh, 192 Mass. 278, 78 N. E. 408. The validity of a tax deed may not be attacked by the administrator of an estate on account of an informality in the record made by the city council of a collector's list of delinquent real estate nor for the failure of the city council to direct its certification to the state auditor and its certification by the city clerk instead of by the mayor as the charter provided, nor for the delay of a city collector in making a return of delinquent real estate for a year after the date fixed by law, when it has been redeemed within one year after the sale, and no fatal defect has been shown in the tax deed, Hogan v. Piggott, 60 W. Va. 541, 56

S. E. 189. Sec. 1263, Rev. Codes 1899, held to bar an objection to a tax sale on the ground of irregularity in the verification of an assessment roll by an assessor (*Eaton v. Bennett* 10 N. D. 346, 87 N. W. 188 overruled) *State Finance Co. v. Mather*, (N. D. 1906) 109 N. W. 350. It was held that a tax sale was not invalid when in the delinquent tax list the words "dollars and cents" were omitted, although the state, county and other taxes were blended, even if the collector failed to attach his affidavit thereon or the assessor to indorse his special oath upon the assessment books. It was also held that the clerk's certificate of publication was correct, *Sawyer v. Wilson*, 81 Ark. 319, 99 S. W. 389.

Amount of property sold. Where the advertisement of a tax sale, which states that the least quantity which any bidder will buy will be sold, is read at the sale and the tax collector asks those present to designate such least quantity, the sale is not invalid, *Tieman v. Johnston*, 114 La. 112, 38 S. 75.

Sec. 556. Redemption from tax sale—General statutes.

Alabama Code 1896, section 4074, which provides that two years after a tax sale the judge of probate shall make a deed to the purchaser construed together with section 4091 providing for redemption from such a sale, *Roach v. State*, (Ala. 1905) 39 S. 685.

Kirby's Arkansas Digest section 7099 and ff as to redemption from tax sales, construed, *Cook v. Jones*, 80 Ark. 43, 96 S. W. 620.

Ten per cent. interest in taxes and charges may be collected from owners by purchasers of land sold for taxes, instead of twenty per. cent. as allowed in Rev. Stat. Ch. 10 Sec. 27; Me. Laws 1907 Ch. 18.

Opportunity for redemption from tax sale is provided where owner is an infant or lunatic by N. J. Laws 1906, Ch. 268.

Laws 1890 c. 132, providing for redemption from tax sales construed, *Blakemore v. Cooper*, (N. D. 1906) 106 N. W. 566.

Acts 1905, Sec. 1, Ch. 132, authorizing redemption of lands sold for taxes to state or city, amended by Tex. Laws 1907 Ch. CXLV.

Sec. 557. Redemption from tax sale—In general—Who may redeem—When—What property—Conditions. Ch. 208 Laws 1899, amending Sec. 1605 Gen. Stat. 1894 cover-

ing payments, by county treasurers, for certificates of tax sales, construed, *State v. Braise*, 96 Minn. 209, 104 N. W. 962.

Although a mortgagee purchases a tax title, he cannot avail himself of the tax deed to destroy the equity of the mortgagor to redeem from the mortgage and tax deed, see *Ballinger's Ann. Codes & St. Supp.* s. 1739, *Shepard v. Vincent*, 38 Wash. 493, 80 Pac. 777.

Ballinger's Ann. Codes & St. Sec. 8, 10, providing that the purchaser at a tax sale shall have a lien for all subsequent taxes paid by him, evidently contemplates that the regular taxes shall afterwards be paid by him when he purchases at a sale foreclosing a special assessment of which the owners never heard. When the subsequent taxes were paid by the owners and there was no evidence of any tender of the money to pay the regular taxes or of any effort to do so, the owners have a right in equity to redeem the land, *Albring v. Petroneo*, 44 Wash. 132, 87 Pac. 49.

If land is sold at two successive tax sales to the same purchaser the owner may redeem by paying the amount due under the first sale, *In re Brodie*, (Minn. 1907) 113 N. W. 2.

Where tax certificates are purchased at a discount the owner must pay the face value in order to redeem, *Maxcy v. Simonson*, 130 Wis. 650, 110 N. W. 803.

Who may. In Arkansas the holder of a donation deed who has paid taxes for several years, having a lien therefor, has such an interest as entitled him to redeem the land when sold for subsequent taxes. But the court in aid of an effort to redeem should not order the land sold, *Waterman v. Irby*, 76 Ark. 551, 89 S. W. 844.

The purchase of property at a tax sale, by one who has led the owner to believe that he would purchase it from him, constitutes such fraud on the owner as entitled him to compel a reconveyance on his tendering the amount paid for taxes, with interest, within a reasonable time, *Ball v. Harpham*, 140 Mich. 661, 104 N. W. 353. Under sec. 661 code of 1887, (*Va. code* 1904, p. 321) the interest of the remainderman is not affected even if the tenant has failed to pay the taxes and the property is sold for non-payment of the taxes; then the remainderman still has a right to redeem the property from such a tax sale, *Glenn v. West*, 106 Va. 356, 56 S. E. 143.

Time. *Sand & H. Dig.* §4819 requiring actions for the

recovery of lands sold for taxes to be brought within 2 years held constitutional and construed, *Ross v. Royal*, 77 Ark. 324, 91 S. W. 178. Persons interested in lands sold for taxes may redeem within 2 years by payment to collector by N. J. Laws 1907, Ch. 204, amending Act of April 8, 1903. Laws 1891 c. 14 Sec. 122, providing that actions to recover lands sold for non-payment of taxes must be brought within three years, bars an action based on immaterial defects in proceedings of assessment and sale, *Bandon v. Wolven*, (S. D. 1906) 107 N. W. 204. When a tax deed has not been recorded until after a demand has been made for possession of the property, the heirs of the former owner may plead infancy as a bar to the operation of Civ. Code 1902, vol. 1, Sec. 426, providing that no action shall be brought for the recovery of land sold by the sheriff for taxes after two years, *Jones v. Boykin*, 70 S. C. 309, 49 S. E. 877.

What property. Under Code 1899 c. 105, s. 17, if a person is allowed to redeem lands forfeited to the State for non payment of taxes it establishes a valid title, and the title can not be attacked by the holder of land subsequently redeemed although his patent overlapped the other, *Mills v. Henry Oil Co.*, 57 W. Va. 255, 50 S. E. 157. When an adverse claimant to land resists the redemption by another owner of the land from forfeiture by the state, the burden of proof is on him to prove that the land of the one asking redemption lies within the boundaries of his own land, *State v. Lowe*, 59 W. Va. 262, 53 S. E. 116.

Sec. 558. Redemption from tax sale—Notices. One who is entitled to notice of expiration of period of redemption must show that no such notice was given in order to question the validity of a tax deed issued to another, *Iowa Loan & Trust Co. v. Pond*, 128 Ia. 600, 105 N. W. 119. Cal. St. 1895, p. 327, c. 218 and Pol. Code §3785, regarding the making of a deed of delinquent property to the state at the end of five years which as amended omitted the provisions for notice of intention to make application for such a deed, was not retroactive in its effect, *Johnson v. Taylor*, 150 Cal. 201, 88 Pac. 903. The amended act, Acts 1901-02 p. 779 c. 658 [Ann. Code 1904 p. 320] requiring the purchaser of a tax title to give to the person in whose name the real estate stood at time of sale, four months notice of said purchase and giving to the person entitled to

redeem the right of redemption at any time before the expiration of the period of notice, has no application in a case in which the two years allowed for the redemption of the land had expired before the amendment came into effect, *Harrison v. Thomas*, 103 Va. 333, 49 S. E. 485. The publication of lists of unredeemed lands is regulated by Wis. Laws 1907 Ch. 502. Various New York Statutes as to the publication of notices of tax sales and redemptions therefrom in the official newspapers of a city, construed, *Troy Press Co. In re* 187 N. Y. 279, 79 N. E. 1006.

Vacant land was assessed to "A et al." The notice of expiration of redemption was addressed to "A et al." and the sheriff returned it with indorsement that they could not be found and that the land was unoccupied. The auditor then published the notice. Held—Service was sufficient, *Berg v. Van Nest*, 97 Minn. 187, 106 N. W. 255.

A final published notice of redemption including several different parcels of land, and running to several persons, is insufficient notice to redeem land sold for taxes under the Nebraska Statute, *Ambler v. Patterson*, (Neb. 1908) 114 N. W. 781.

Sec. 559. Redemption from tax sale—Loss of rights. Under Ohio Rev. St. 1906, section 2899, where lands have been duly forfeited to the state for nonpayment of taxes a valid sale thereof by the county auditor extinguishes all previous titles, legal or equitable, and vests the buyer with a perfect title free from all prior liens and incumbrances, *Kahle v. Nisley*, 74 Ohio St. 328, 78 N. E. 526. When a new county was created from a part of El Paso county, the Treasurer of the new county was the proper one to issue a tax deed after three years from the sale for taxes according to Mill's Ann. St. s. 3905, and the owner could not thereafter redeem the property by paying the amount of the taxes to the Treasurer of the old county, *Pollen v. Magna Charta Min. & Mill. Co.*, (Colo. 1907) 90 Pac. 639.

Sec. 560. Tax deeds—In general—Validity—Title passed under—Rights under void deed. The Auditor General is authorized to give a deed of land sold for taxes, subject to conditions, by Mich. Acts 1907 No. 34, amending Sec. 3904 and 3905 Comp. Laws 1897. Sec. 3127 B & C's Codes prescrib-

ing the form and effect of a sheriff's deed of land sold for non-payment of taxes is amended by Ore. Laws 1907 Ch. 179. Mississippi Rev. Code 1857, p. 80, c. 3, art. 39, which provides that the tax collector shall file all deeds for lands sold to the state in the office of the probate clerk, construed, *Day v. Smith*, 87 Miss. 395, 39 S. 526. A bill to enjoin the issuance of a tax deed upon the ground that it will cloud the title does not involve a freehold so as to give the Illinois Supreme Court appellate jurisdiction, *Glos v. Sanitary Dist. of Chicago*, 224 Ill. 272, 79 N. E. 562.

If a description of land in a tax deed describes it as "4.520 acres in 13, range 7, W. E. L. S." it not only does not pass any title but the description is inadequate and insufficient to create a cloud on the title, *Powers v. Sawyer*. 100 Me. 536, 62 Atl. 349.

Mistakes and imperfections in. A valid tax sale is not vitiated by a misdescription in the deed; though the purchaser is entitled to have the deed corrected, *Harding v. Auditor General*, 140 Mich. 646, 104 N. W. 39. St. 1893, Sec. 5657 was construed as requiring the amount for which each of six tracts of land was sold to be shown on the face of the tax deed, and where only the total sum paid was shown the deed was void. *Lowenstein v. Sexton*, 180 Okl. 332, 90 Pac. 410. A tax deed describing land as "part E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, sec. 32 T 12 S R I W" is void because of imperfect and uncertain description and under such an instrument the statute of limitations does not run, *Dickinson v. Arkansas City Co.*, 77 Ark. 570, 92 S. W. 21. By the liberal construction of the statute authorizing the sale of land for non-payment of taxes authorized by Wilson's Rev. and Ann. St. 1903, §6037 an omission in a tax deed of the statement that no one else offered a bid as high as the bid made by the county treasurer, did not invalidate the deed, and the fact that the county subsequently sold to a bank, which was not allowed to hold real estate, did not render the tax deed void. *Jones v. Carnes*, 17 Okl. 470, 87 Pac. 652. Under Pol. Code of California s. 3785 as amended by St. 1895, p. 328, c. 218, a tax deed which gave the date of the sale but which omitted to state in definite terms the time when the right of redemption expired was void, *Baird v. Monroe et al.*, 150 Cal. 560, 89 Pac. 352. Under Laws 1903, p. 14, c. 15, §2, an irregularity in a tax deed by reason of the treasurer's not having affixed

the seal of his office to the deed was cured, and all such deeds made prior to the passage of the Act were validated, *Spokane T. Co. v. Stanford*, 44 Wash. 45, 87 Pac. 37. Where by a mistake in making out the deed a purchaser at a tax sale only took part of a certain town lot, when the whole lot was in reality owned by the same owner, he acquired the title to the whole lot. (See Sec. 25, Chap. 31, Code of 1899). *Cain v. Fisher*, 57 W. Va. 492, 50 S. E. 752.

Seal. Although the tax law provides that the official seal of a county shall be affixed to a tax deed, a deed is not void although it only has the seal of the "county clerk of —." *Clarke v. Tilden*, 72 Kan. 574, 84 Pac. 139.

Title passed. When the plaintiff owned a tax deed his title was sufficient to bring a suit against a trespasser who removed a building for which he had supplied part of the material, *Kunkel v. Utah L. Co.*, 29 Utah 13, 81 Pac. 897. Kirby's Arkansas Digest section 7105, which provides that a tax deed shall vest in the buyer all the right, title, interest, and estate of the former owner and also the right, claim and title of the state and county thereto, construed, *Osceola Land Co. v. Chicago Mill & Lumber Co.*, (Ark. 1907), 103 S. W. 609. Although a city was notified of a tax sale, the tax deed did not convey the property free and clear of any taxes due the city under Sec. 17, 20, of the act regarding the collection of taxes, (App. 20, Del. Laws p. 9.), *Knowles v. Morris*, (Del. Super. 1907), 65 Atl. 782. Pol. Code s. 3817 was construed, and the owner of a piece of property which has been sold for taxes has no right or interest in it after the State has given the final tax deed to a purchaser, and the former owner could not maintain an action for rent against a tenant, *Teich v. Arms*, (Cal. 1907) 90 Pac. 962.

Rights of purchaser under void deed. A holder of land under a tax deed valid upon its face and duly recorded is a person appearing upon the records as owner within Mass. Rev. Laws, c. 12, section 15, which provides that the taxes shall be assessed to such person, although they were in fact held invalid by a court of competent jurisdiction on account of errors in the previous assessment, *Roberts v. Welsh*, 192 Mass. 278, 78 N. E. 408. A void tax deed is admissible as color of title unless uncertain and indefinite in its description. Where it is silent as to whether the township is north or south and the range east or west, but recites the

advertisement of the land for sale for taxes due from a named owner oral evidence is admissible to aid in showing its exact location. The grantee, however, may not look at the deed on the witness stand and state in which township and range it is situated, *Brannon v. Henry*, 142 Ala. 698, 39 S. 92.

Loss of right to attack deed for invalidity. Although a tax deed is void for failure to acknowledge and prove it before recording, yet the title of the owner of the property is forfeited if he fails to keep the property in his own name on the tax books although he pays the taxes himself in the name of the holder of the void tax title, *State v. Harman*, 57 W. Va. 447, 50 S. E. 828. St. 1893, c. 70 §25 (running sec. 5667) relating to the time within which a tax deed could be redeemed, construed as rendering a tax deed, which was not void on its face, valid after it had been duly recorded for one year if the purchaser had taken possession of the property, *O'Keefe v. Dillenbeck*, 15 Okl. 437, 83 Pac. 540. According to *Ballinger's Ann. Codes & St. s. 1767*, a judgment for the deed to real estate sold for delinquent taxes, shall estop all parties from raising objections to a tax title thereon, and an owner was thereby estopped to object that the tax deed was void, after he had allowed the taxes to be delinquent for 12 years, *Carson v. Titlow*, 39 Wash. 196, 80 Pac. 299.

Reform. In Missouri equity has no jurisdiction to reform a sheriff's deed under a tax sale but the remedy prescribed in Rev. St. 1899, section 3218 must be pursued, *Dixon v. Hunter*, 204 Mo. 382, 102 S. W. 970.

Remaindermen who were not made parties to a tax proceeding are not bound by a tax deed given upon a sale to pay the judgment therein recovered, *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997.

Sec. 561. Tax deeds—Conclusiveness and effect of as evidence—Tax certificates.

Effect of deed as evidence. Sec. 1444 Code, making a tax deed conclusive evidence of the purchaser, construed, *Farmers' L. and T. Co. v. Wall*, 129 Ia. 651, 106 N. W. 160. When a tax deed 100 years old regular on its face was introduced the burden was upon the opposing side to attack its validity by showing in what particulars it was deficient, *Hughes v. Owens*, (Ky. 1906) 92 S. W. 595, Pol. Code §3898, 3897, relating to the execution of a deed at a tax sale, was not con-

strued to render a recital in a deed that the title had passed from A to the state proof conclusive of such a fact, *County Bank of S. L. O. v. Jack*, 148 Cal. 437, 83 Pac. 705. A duly recorded tax deed to the state made in pursuance of Louisiana Act of 1888 No. 85, p. 130, section 53 is prima facie evidence of a valid tax sale which vests the title in the state at the expiration of one year. One who claims that the tax debtor was dead at the time of the assessment has the burden of proving it, *Iberia Cypress Co. v. Thorgeson*, 116 La. 218, 40 S. 682. A tax deed which gives the name of the grantee, the dates of the tax sales for unpaid taxes of stated years, the numbers of the tax certificates, the name in which the property was assessed, the amount paid for the certificates, a description of the lands and is executed in the prescribed form, is not void upon its face. By the Florida Statutes such a deed is prima facie evidence of the regularity of the proceedings from the valuation of the land to the date of the sale, *Cowan v. Skinner*, (Fla. 1907) 42 S. 730. Under Louisiana Constitution 1879, article 210, a tax deed is prima facie evidence of a valid tax sale, although it does not recite that notice of delinquency was given the tax debtor. And under Constitution 1898, article 233, a tax sale cannot be set aside after the expiration of three years from the adoption of the Constitution except upon proof of dual assessment or prior payment of the taxes for which the property was sold, *Little River Lumber Co. Limtd. v. Thompson*, 118 La. 284, 42 S. 938. 2 Mills Ann. St. Sec. 3900, 3902, providing that a purchaser must pay off all subsequent taxes when he purchases the tax deed, and that the tax deed when issued should be prima facie evidence that the sale was properly made, that the property was subject to taxation and that the levy was correct, was construed as rendering a tax deed void when it contained no recital in the deed that the subsequent taxes were paid if no other evidence showed they were paid, *Carnahan v. Sieber C. Co.*, 34 Colo. 257, 82 Pac. 592. Under Arkansas Rev. St. 1837 c. 128 sections 133 and 134 a tax deed is prima facie evidence of title in the purchaser. Proof that the land so sold once belonged to the Real Estate Bank, whose lands were exempted from forfeiture while held by the Receiver, and no deed from him appears on record, is not sufficient to overthrow the presumption in favor of the tax deed. The fact that in his report upon a proceeding to wind up the bank's affairs the receiver stated that he omitted

the land from his list of the assets is evidence that they had been previously sold, *Cracraft v. Meyer*, 76 Ark. 450, 88 S. W. 1027.

Although a purchaser at a tax sale records his deed pending the suit, the burden of proof is still on him to show that every formality leading up to the tax sale and including it has been complied with in all material matters, *Columbia Finance & T. Co. v. Fierbaugh*, 59 W. Va. 334, 53 S. E. 468.

Tax certificates. The issue of duplicate certificates authorized and made assignable by Ia. Laws 1907, Ch. 61. Pol. Code, s. 3776, relating to the requirement that only the amount of the assessment must be shown on a tax sale certificate, is construed not to render it invalid if the amount of the costs, etc., are not set forth separately, *Bank of Le Moore v. Fulgham*, (Cal. 1907) 90 Pac. 936. Although a tax deed may have been of record for more than five years, it may be set aside on proof that the tax certificate omitted to show the amount for which it was bid off at the tax sale, *Penrose v. Cooper*, 71 Kan. 720, 81 Pac. 489.

Sec. 562. Statute of limitations as affecting tax titles.

Arkansas. Two years of open, continuous adverse possession of land in Arkansas under a tax deed gives title by the Statute of Limitation, *Carpenter v. Smith*, 76 Ark. 447, 88 S. W. 976.

Kansas. When the holder of the tax title had paid the taxes for the specified time, he had full title to the property and could prevent the mortgagees holding under a mortgage, which under its terms was barred by the statute of limitations from enforcing their rights, *Snyder v. Miller*, 71 Kan. 410, 80 Pac. 970.

Louisiana. The prescription of three years in article 233 of the Louisiana Constitution of 1898 against actions to annul tax sales, construed, *Terry v. Heisen*, 115 La. 1070, 40 S. 461. The original owner of land who is not in possession at the date of bringing suit cannot recover it where it passed to the state for taxes and was sold by it over 30 years ago, was assessed in the name of the tax buyer for years, resold for taxes and later conveyed to the defendant, *Rovens v. McRobinson*, 117 La. 731, 42 S. 251. Section 233 of the Louisiana Code of 1898, providing for a three year prescription in cases of tax sales, construed, *Prater v. Craighead*, 118 La. 627, 43 S. 258. When

a plaintiff alleges that he is the owner and in possession of land on which the defendant had unlawfully trespassed and cut down and hauled away timber, and the defendant claims under a tax title, the cause of action is *ex delictu* and in Louisiana the defendant's acts prior to one year are prescribable by the prescription of one year provided by the statute, *Gilmore v. Schenck*, 115 La. 386, 39 S. 40.

Michigan. Conditions under which holders of tax deeds are barred from claiming title are specified by Mich. Acts 1907, No. 58 Under Laws 1885, No. 153 Sec. 116 and Laws 1893 No. 206 Sec. 73 the state is not entitled to the benefit of the limitation period applicable to land sold for taxes, *Morse v. Auditor General*, 143 Mich. 610, 107 N. W. 317. Under Gen. Tax Law, Sec. 127 the right to attach a tax title is barred after six months from the determination that the land is unoccupied in spite of long delay in the execution of the deed to the state, *Downer v. Richardson*, 148 Mich. 596, 112 N. W. 761. Under Sec. 70 of the general tax law (1893 No. 206) a suit to set aside a tax deed, if brought nearly two years after notice of the sale, is barred, *Hall v. Miller*, (Mich. 1907) 113 N. W. 1104.

Minnesota. In an action to determine adverse claims to lots of land, where plaintiff's title is based upon tax deeds, the short statute of limitations, prescribed for actions to test the validity of tax sales, is inapplicable, *Willard v. Hodapp*, 98 Minn. 269, 107 N. W. 954.

Mississippi by passing its acts of 1888, p. 42, section 5 waived the protection of the earlier statutes of limitations as to sales of land to the state for taxes, *McLemore v. Anderson*, (Miss. 1907) 43 S. 878.

South Dakota. A devisee of a tenant in common, who pays taxes on the land, does not thereby set the statute of limitations in motion, there being no such exclusive possession as to constitute ouster of his co-tenants. Rev. Code Civ. Proc. Sec. 54 and 55 construed, *Barrett v. McCarthy*, (S. D. 1905) 104 N. W. 907.

Washington. Actions to set aside tax deeds are required to be brought within 3 years by Wash. Laws 1907 Ch. 173.

Wisconsin. Statutes of limitation are extended to purchases of land by the state by Wis. Laws 1907. Ch. 491. Rev. St. 1898 Sec. 4249 and 4250, providing for the computation of periods of limitation, construed in their relation to tax deeds,

Preston v. Thayer, 127 Wis. 123, 106 N. W. 672. Rev. St. 1898, Sec. 1187 and 1188, limiting actions to recover land sold for taxes, construed, Wisconsin River Land Co. v. Paine Lumber Co., 130 Wis. 393, 110 N. W. 220. Under Rev. St. 1898 Sec. 1187-1189b, a married woman who purchases from the grantee under a void tax deed and holds the premises 10 years is entitled to recover for trespass by the original owner, Brunette v. Norker, 130 Wis. 632, 110 N. W. 785.

Under void deeds. A person not in actual possession under a defective sheriff's deed under a tax sale is not protected by the statute of limitations, Dixon v. Hunter, 204 Mo. 382, 102 S. W. 970. Although the purchaser at a tax sale recorded his deed he did not obtain title under the provisions of the statute of limitations when the tax deed was void on its face in consequence of irregularities, Keller v. Hawk, (Okl. 1907) 91 Pac. 778. Although a tax deed is imperfect and inoperative to convey a good title the holder of the deed has a right to set up the statute of limitations against the right of the mortgagee to foreclose, Graves v. Seifried, 31 Utah 203, 87 Pac. 674. If a tax deed has not been acknowledged before the clerk of the district court, it is void on its face and insufficient to constitute color of title sufficient to set in motion the six year statute of limitations, Mathews v. Blake, (Wyo. 1907), 92 Pac. 242.

When statute of limitations cannot be relied on. An entry under a lease prevents the occupant from taking advantage of the running of the statute of limitations in his favor as claimant under tax title, (Laws 1899 No. 262), Lee v. Livingston, 143 Mich. 203, 106 N. W. 713. Prescription does not run in favor of tax titles when the tax debtor is permitted to remain in possession, Tieman v. Johnston, 114 La. 112, 38 S. 75. In Louisiana prescription does not run in favor of a tax title against an owner in possession when the taxes for which the land was sold were not assessed in the name of the owner and he had no notice of the proposed sale, and the holder of the tax title is not entitled to reimbursement for taxes and penalties paid by him, Posey v. Ducros, 115 La. 359, 39 S. 26.

Sec. 563. Recovery and refunding of illegal taxes paid. The recovery and refunding of taxes erroneously paid are authorized by Ala. Laws of 1907, No. 698. Taxes erroneously collected may be refunded in accordance with Cal. Stat. 1907,

Ch. 412, amending Sec. 3804 of the Political Code. Ch. 24 Sec. 256 Gen. Laws regulating the refunding of taxes paid upon illegal, erroneous, or unequal assessments, is amended by N. Y. Laws 1907, Ch. 721. A taxpayer whose share of an illegal tax would be only \$1.44 may represent the whole body of taxpayers in a suit to enforce a judgment for illegal taxes, collected by the sheriff, *Ratliff's Ex'rs. v. Commonwealth*, 31 Ky. Law Rep. 154, 101 S. W. 978.

Pol. Code sec. 3817 as amended March 1895 (St. 1895, p. 333, c. 218) were construed as enabling one owing taxes and penalties on delinquent land at or before the time of sale for taxes to pay the amount of the charges against it, but when the land was insufficiently described by metes and bounds in the advertisements, the penalties were illegally exacted and recoverable, *Palomares L. Co. v. Los Angeles County*, 146 Cal. 530, 80 Pac. 931. Where all of a railroad's property in a county was assessed and the taxes thereon paid but a portion of the road was by mistake apportioned to the wrong township and when the mistake was discovered the auditor without legal right assessed it as omitted property in the proper township, a second payment thereof by the railroad was voluntary and could not be recovered back, *Baltimore &c. R. Co. v. Oregon T. P.* (Ind. 1907) 81 N. E. 105.

Sec. 564. Action to confirm or quiet tax title.

As to quieting titles in general see *ante*, QUIETING TITLE.

Louisiana Act of 1898, No. 101 as to actions to quiet a tax title, construed, *Lisso & Bro. v. Unknown Owner*, 114 La. 392, 38 S. 282. One in possession can maintain an action for slander of title against a person disclaiming title and another claiming under a void tax title, *Posey v. Ducros*, 115 La. 359, 39 S. 26. Mississippi Rev. Code 1892, section 498, providing for the confirmation of a tax title does not apply to a case where the purchaser admits in the proceedings that his tax deed was void, *Moore v. Flurry*, 87 Miss. 707, 40 S. 226. An action to remove a cloud on a title does not lie against a city which holds a lien on land as the result of a tax sale, *Weyman v. City of Atlanta*, 122 Ga. 539, 50 S. E. 492. In an action to set aside tax deeds as a cloud on title where the defendant's title was invalid but the plaintiff's *prima facie* title was overcome by proof of a prior deed to other parties the plaintiff cannot have relief, *Glos v. Greiner*, 226

Ill. 546, 80 N. E. 1055. Where the heirs at law bring a bill against the owner of the tax title to the real estate involved, to declare the deed void, and to declare the dower of the widow in the real estate barred, the bill asserting such different demands is multifarious, *Frum v. Fox*, 58 W. Va. 334, 52 S. E. 178.

Parties. In a proceeding to confirm a tax title the owner at the date of sale, or his heirs, should be made parties as well as all others interested therein, as far as known to the complainant, or ascertainable by diligent inquiry. Such parties not being joined, the chancellor properly gave leave to amend and upon the complainant declining so to do, dismissed the bill, *Smith v. W. Denny & Co.* (Miss. 1907) 43 S. 479.

TENANTS IN COMMON AND JOINT TENANTS

As to adverse possession of tenants in common, see *ante*

§9.

Ejectment as to, see *ante* §113.

Co-owners in mining claims, see *ante*, §355.

Sec. 565. Creation of estate. A conveyance to A and B who live together as man and wife without being legally married operates to give them an estate as tenants in common, *Wright v. Kayner*, (Mich. 1907) 113 N. W. 779. A deed of land to "G and the heirs of her body which she now has or may have by M her husband" granted a fee in which G and her children took as tenants in common, *Reeves v. Cook*, 71 S. C. 275, 51 S. E. 93. Where the plaintiff who lived on a farm agreed with the defendant to allow him to occupy a house thereon free of rent while he was to operate the farm and divide the profits with the plaintiff, both parties supplying certain articles, the parties were tenants in common of the farm products and as to the occupation of the house the relation of landlord and the tenant did not exist, *Mead v. Owen*, (Vt. 1907), 67 Atl. 722.

The mere use of land and buildings by a firm for partnership purposes does not make them firm assets and where they were owned by the partners, brothers, as tenants in common, not entered on the firm books and no rent paid therefor they

were not partnership property, although the firm paid taxes, insurance and repairs thereon. Buildings on land so held in common which were made over by the firm into dwelling houses, the firm being reimbursed for the expense out of the rents collected, were not firm assets, *Taber-Prang Art Co. v. Durant*, 189 Mass. 173, 75 N. E. 221.

Joint tenancy. A deed to two persons, "in case of death of either—the other to have the whole of said property without litigation" creates a joint tenancy for life with remainder in fee simple to the survivor, *Cover v. James*, 217 Ill. 309, 75 N. E. 490.

Sec. 566. Sale and conveyance of an estate in common.

A contract of one tenant in common to convey the whole of the joint property cannot be enforced against his co-tenants but may be enforced as to his interest therein, *Moore v. Gariglietti*, 228 Ill. 143, 81 N. E. 826. Where one tenant in common conveys by metes and bounds the other tenants are bound thereby as his heirs but not as tenants in common and are entitled to partition as if no conveyance had been made, *Finch v. Green*, 225 Ill. 304, 80 N. E. 318. When a deed was given to C and her children, who took possession, from a co-tenant and other co-tenants became barred by 20 years adverse possession, then C and her children were tenants in common, but a deed by C previous to the expiration of the twenty years would only convey her interest and not the interest of her children, *Coleman v. Coleman*, 71 S. C. 518, 51 S. E. 250.

Sec. 567. Purchase by co-tenant of outstanding interest enuring for benefit of all. A tax title acquired by one joint tenant inures to the benefit of all, *Moragne v. Doe*, 143 Ala. 459, 39 S. 161. When a purchaser's assignee discovers another title and purchases it, he is not entitled to possession of the land as a co-tenant when he does not pay the vendor for the land, and he is only entitled to reimbursement for the amount he expended, *Garvey v. La Shells*, (Cal. 1907) 91 Pac. 498. When A and B held a half interest in a lease of certain property and C held the other half interest, A and B had a right to purchase the property, and C had no right to share the benefits of the purchase of her co-tenants if C was unable to show that she had done equity when she first knew of the purchase by offering to pay her proportionate share of the

purchase price, *Kershaw v. Simpson*. (Wash. 1907) 89 Pac. 889. If land is sold as an entirety for non-payment of taxes by all co-tenants, and is brought by one of the co-tenants, it amounts merely to the payment of the tax, and the purchasing co-tenant has no additional right in the land except to secure the payment of the amount paid by him for taxes for the other co-tenants, *Williams v. Clyatt*, (Fla. 1907) 43 S. 441. The right of co-tenants to elect to treat a redemption of a mortgage by one of their number as inuring to the benefit of all is merely equitable. They must, therefore, offer to contribute their share of the expense within a reasonable time which in analogy to the two year period allowed a mortgagor to disaffirm a mortgagee's purchase at his own sale without contractual permission, is two years, *Savage v. Bradley*, (Ala. 1907) 43 S. 20. Where A holding a one-sixth interest as tenant in common to certain land, bought the tax title from B, who purchased it at a tax sale, none of the proceedings of which were claimed to be invalid, the purchase did not inure to the benefit of A's co-tenants, but the property belonged to A alone, when the only basis of fraud proved was the great age of C the other co-tenant who was also the mother of A and lived with her, *Woglom v. Kant*, 69 N. J. Eq. 489, 61 Atl. 9.

Sec. 568. Ouster—Limitations. A right of entry upon premises may be for an occupancy which it would clearly be within the power of one co-tenant to permit, *Lee v. Follensby*, (Vt. 1907), 67 Atl. 197. The statute of limitations does not run in support of the title of a tenant in common against his co-tenants, until after actual ouster of the co-tenants, when the title is valid after ten years adverse possession, *Green v. Cannady*, 71 S. C. 317, 51 S. E. 92.

Facts showing ouster. Upon the evidence it was held that the holding of the whole tract by one tenant in common was in fact of such notorious character as to amount to an ouster of the co-tenant and set the statute of limitations running, *Steele v. Steele*, 220 Ill. 318, 77 N. E. 232. An entry by the devisee under a will of one tenant in common under a devise which purports to convey the whole estate, not acknowledging the right of any other person in the land, amounts to an ouster of co-tenants and the possession of the devisee is adverse as to them, *Waterman Hall v. Waterman*, 220 Ill. 569, 77 N. E. 142. A tenant in common who has actual notice of

the adverse possession, by a grantee of the other tenant, of the entire property thus owned in common, though he has no knowledge of the deed, after the statutory period of limitation loses all right to the land, *Sanford v. Safford*, 99 Minn. 380, 109 N. W. 819. A co-tenant holding land for 40 years to the exclusion of his co-tenants obtains a valid title as the ouster is presumed at the beginning of the possession, when there has been no demand or claim for rents, *Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E. 870.

Where no ouster took place. If one co-tenant pays the taxes on land it does not constitute an ouster of the other co-tenant, *Clark v. Beard*, 59 W. Va. 669, 53 S. E. 597. Evidence examined and held to show that one tenant in common in possession of land had never done acts equivalent to an actual ouster of his co-tenants and therefore had never acquired title by adverse possession, *Courtner v. Etheredge*, (Ala. 1907) 43 S. 368. A sheriff's sale of the interest of one tenant in common does not deprive the other of his rights or put in motion the statute of limitations as against him, *Curtis v. Barber*, 131 Ia. 400, 108 N. W. 755. A tenant in common is not ousted by the renting of the premises to a third party and the payment of taxes and making repairs by the other tenant where there is no further notice of claim of title and no hostile acts, *Curtis v. Barber*, 131 Ia. 400, 108 N. W. 755. Where a co-tenant gave a mortgage on land, and after foreclosure of the mortgage the sheriff showed the purchaser the vacant land and said that he delivered it to him, that did not constitute ouster of the other co-tenant so as to form a starting point for prescription against him, *Harriss v. Howard*, 126 Ga. 325, 55 S. E. 59. When all except one of several tenants in common execute a deed to the whole of a piece of land leaving out one of the tenants, his title does not pass, and adverse possession for less than twenty years is not sufficient to presume an ouster against the other co-tenants, *Bullin v. Hancock*, 138 N. C. 198, 50 S. E. 621. When one tenant in common conveyed his interest, reserving mineral rights, in the absence of an open, notorious assertion of claim by the purchaser to the minerals and a direct interference with or denial of the seller's rights thereto the statute of limitations does not begin to run against the latter, *Moragne v. Doe*, 143 Ala. 459, 39 S. 161.

Sec. 569. Mutual rights and liabilities. Under Kentucky Statutes 1903 section 489 when one joint tenant refrains from suing or joining in a necessary suit to recover joint property and allows his co-tenants to take the hazards and labor of the common litigation, he must bear a share of the common burden, *Estill's Trustee v. Francis* (Ky. 1905) 89 S. W. 172. When the surviving partner of an insolvent firm makes a deed to a mortgagee of the partnership property, such deed may compel a conveyance by the heirs of the deceased partner of their interest. *Bank of Southwestern Georgia v. McGarrah*, 120 Ga. 944, 48 S. E. 393.

Under an oral agreement a tenant in common erected a building with the oral understanding that he should allow his tenant in common a half interest in it after the rents from the building had paid back one-half of its cost. The surrender of the land for the building constituted part performance so as to withdraw the agreement from the operation of the statute of frauds. *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145.

When in a land dispute the parties are tenants in common, it is not permissible for one to question the validity of the title, and as both are claiming under the same third party it is sufficient for the plaintiff to show a derivation of title from him and it is not necessary that he should trace the title back to the Commonwealth, *Heard v. Cherry*, (Ky. 1906) 92 S. W. 551.

A and B contracted to buy a tract of land of which each should own one-half and contribute one-half to the purchase price. When B did not contribute his share A notified him that the agreement had been extended, but that B would forfeit his rights in the property if he did not make the payments when due and that A would pay the required amount himself and forfeit B's rights. B did not raise the money and after A paid it himself he brought suit to quiet title, but A and B were tenants in common and A had no right to enforce the forfeiture of B's rights in the property, but B was entitled to a one-half interest in the property on payment of one-half of the purchase price, *Anderson v. Snowden*, 44 Wash. 274, 87 Pac. 356.

A joint owner in possession is chargeable with rents, and may recover as against his co-owners for taxes, insurance and necessary repairs which inured to their benefit but not, in the, absence of contract for commissions on collections or com-

pensation for superintendence, *Sharp v. Zeller*, 114 La. 549, 38 S. 449.

Where the notice as provided by section 5, chap. 118, p. 267, Laws of 1899 was not posted on property, a tenant in common, who had granted a vendee the right to enter on the property to make improvements, was liable for the cost of the improvements and a mechanics' lien might be entered for them by the lien claimant, *Seely et al v. Neill et al.*, 37 Colo. 198, 86 Pac. 334.

TITLES

Title in compliance with contract of purchase, see *post* §601.

Color of title, see *ante* §14.

Proof of title necessary in ejectment, see *ante*, §114.

Quieting title, see QUIETING TITLE.

Title insurance, see *ante* §267.

Tacking titles, see *ante* §18.

Sec. 570. Proof of title—Slander of title. Sec. 960 Code Civ. Proc., in relation to proof of title to unoccupied lands or timber, is amended by N. Y. Laws 1906 Ch. 509. Proof of possession of land with claim of ownership by a decedent and the devise thereof by him is prima facie proof of title in the devisee, *Glos v. Ptacek*, 226 Ill. 188, 80 N. E. 727. Where the plaintiff and the defendant both claim to have derived title to land from a common grantor, the court did not err in excluding from evidence a deed conveying the land to the common grantor, the source of his title being immaterial, *Corker v. Stafford*, 125 Ga. 428, 54 S. E. 92.

In a bill for specific performance a deed to the plaintiff, signed by C as executor and trustee under the will of N. C. upon which was written an assent and quit claim, purporting to be signed by 10 persons, described as "all the heirs, devisees, legatees, next of kin, and all persons interested in the estate of N. C. deceased", together with testimony that the plaintiff had ever since claimed the land conveyed, failed to establish his title thereto. No testimony was offered of the will, its pro-

bate, or any action taken to bar assets from the payment of debts, *Cawley v. Jean*, 189 Mass. 220, 75 N. E. 614.

Under a statute providing that "affidavits explaining any defect in the chain of title to any real estate may be recorded as instruments affecting the same," an affidavit identifying the land mentioned in a will may be recorded, and makes the title valid so that an action for specific performance of a contract of sale may be maintained by the vendor. *Hautz v. May*, (Iowa 1908) 114 N. W. 1042.

Where the seller who had agreed to make his title "perfect or satisfactory" within four years, with the knowledge of the buyer brought a suit to confirm his title under the provisions of Kirby's Arkansas Digest sections 647-660, the buyer having previously agreed to accept such confirmation as satisfactory, the latter must accept such title and rely for any damages due to lack of title upon a suit on the covenants in the deed, *Letchworth v. Vaughan*, 77 Ark. 305, 90 S. W. 1001.

Slander of title. Only one in possession can sue for slander in title. When at every returning season operations are carried on with a view of pulling down trees upon swamp lands the person so doing is in possession, *South Louisiana Land Co. v. Riggs Cypress Co.*, 119 La. 714, 43 S. 1003.

Sec. 571. Abstracts and abstracters—Liability—Statute governing.

Abstracts of title are prima facie evidence of lost deeds under N. D. Laws 1907 Ch. 2. Abstracts are made prima facie evidence of land titles and their use as such is regulated by Mo. Laws 1007, p. 271. The filing of lands by abstracters of title is required by Neb. Laws 1907, Ch. 98, amending C. S. Ch. 73, Sec. 65.

When one member of a firm of lawyers was negligent in the examination of an abstract of title each member was liable for the loss suffered, although the firm was later dissolved and the other members had no knowledge of the transaction, *Priddy v. MacKenzie*, 205 Mo. 181, 103 S. W. 968. When an abstracter furnished an erroneous abstract to a husband who delivered it to a building association to get a loan, and the latter's attorney reported the title good relying on the abstract, and the association therefore advanced the money, the abstracter having had no knowledge of the purpose for which the husband

wanted the abstract is not liable to the association for damages due to his mistake, *Equitable Bldg. & Loan Assn. v. Bank of Commerce*, (Tenn. 1907) 102 S. W. 901.

Sec. 572. Registration under Torren's law. The Torren's act entitles "any owner of land, whether his title be of record in the office of the register of deeds or not, to maintain proceedings thereunder to register his title," *National Bond & Security Co. v. Anderson*, 99 Minn. 137, 108 N. W. 861. In Massachusetts an application for registration of a title is a proceeding in rem which operates directly to vest and establish title to the land and the land court, therefore, has jurisdiction to determine the boundary. The city in which the land lies is entitled to be heard upon this question and may appeal from a decision of the land court thereon, *First Nat. Bank v. Woburn*, 192 Mass 220, 78 N. E. 307.

Under Laws 1905 c. 305, Sec. 13 providing that in proceedings to register titles the state shall be joined whenever it has "an interest in or lien upon" the land in question, the state must be made a party if it has a tax lien on the land, *In re National Bond and Security Co.*, 96 Minn. 119, 104 N. W. 678.

Certain defendants in a petition to register title to land cannot object to a decree against them because other defendants were not properly served. Objections to the competency of the applicant himself as a witness cannot be raised for the first time upon appeal. His adverse possession and that of his ancestors and grantors having been open, exclusive, and notorious since 1847 gave him title as against claimants none of whom had been under any disability for more than 30 years prior to the application for registration, *O'Laughlin v. Covell*, 222 Ill. 162, 78 N. E. 59.

A deed and possession thereunder by the petitioner for 16 years without proof of the payment of taxes for at least 7 consecutive years did not show title as against the world, which is necessary for the registration of title. Abstracts of title without a proper foundation are inadmissible even before the official land examiner of the land court who occupies a position similar to that of a master in chancery. But where upon an application for registration of a tract 220 feet deep title was shown to only a depth of 161 feet registration should be granted to that portion, *Glos v. Holberg*, 220 Ill. 167, 77 N. E. 80.

A decree under the Torren's act was based upon a forged power of attorney to foreclose a mortgage. Held, as against the one who procured the registration with notice of the forgery, and purchasers from him, also with notice, the mortgagee might have a decree restoring him to his former rights, *Baart v. Martin*, 99 Minn. 197, 108 N. W. 945.

Statutes. Actions are permitted to recover from counties damages sustained through registration of titles to land by Ill. Laws 1907 p. 207, amending Sec. 101 and 102 of Act of May 1, 1897. Act of May 1, 1897 for the registration of land titles is amended by Ill. Laws 1907 p. 208. Concurrently with registration proceedings a petitioner may apply for a determination of the boundaries of his flats or lands adjacent to high water, Mass. Acts 1906, Ch. 50. Guardians ad litem may be appointed by the land court in petitions for registration under Mass. Acts 1906, Ch. 452, amending Art. 128 Sec. 32 Rev. Laws. Under the Mass. Statutes the Superior Court upon an appeal from the land court may amend the issues framed by the land court, *Luce v. Parsons*, 192 Mass. 8, 77 N. E. 1032. Mass. St. 1902, p. 370, c. 458, section 1, as to appeals from the land court, construed, *Foss v. Atkins*, 193 Mass. 486, 79 N. E. 763. Mass. St. 1905, p. 208, c. 288, as to appeals from the land court to the Superior Court, construed, *Woodvine v. Dean*, 194 Mass. 40, 79 N. E. 882. Various sections of B. & C.'s Codes relating to the procedure in registering titles are amended by Ore. Laws 1907, Ch. 142. The registration of land titles is regulated by Wash. Laws 1907, Ch. 250.

TREES

Alienation of timber-culture lands, see *ante*, §468.

Rights of abutting owners in trees, see *ante*, §229.

Experiments in and raising trees as public use, see *ante*

§122.

Damages to from fires, see *ante* §182.

Injury to trees by trespassers, see *post* §§577, 578.

Trees in highways, see *ante* §229.

Taxation of timber, see *ante*, §541.

Vendor's lien on timber cut, see *post*, §607.

Sec. 573. Nature of conveyance of—Title acquired—

When trees must be cut. Where a plaintiff signs an unambiguous contract of sale of timber, and no effort is made for the reformation of the instrument on the ground that it does not speak the true agreement, the granting of an injunction to restrain the defendant from cutting the timber is an error, *E. Swindell & Co. v. Saddler*, 122 Ga. 15, 49 S. E. 753. Timber cut under an oral contract at \$3 per 1,000 feet cannot be recovered upon by the seller at \$4 per 1,000 feet simply because the parties later executed a written contract at the rate of \$4 which did not refer to that already cut, *Hendrickson Lumber Co. v. Pretorious*, (Ark. 1907) 101 S. W. 733.

When a life tenant sold standing timber with a covenant of warranty on breach thereof the purchaser had no lien on the money paid for the timber either in the hands of the life tenant or her children and heirs, which would authorize a bill in equity against any of them to obtain a personal decree for the purchase price. If the covenant were broken during her life the purchaser had a complete remedy at law against her if after her death an action against the administrator would be proper and adequate, *Zimmerman Mfg. Co. v. Wilson et al.*, 147 Ala. 275, 40 S. 515.

Title. For terms of a contract construed as not vesting in vendee any right to enter and cut timber from land to be conveyed, see *C. H. Phinney Land Co. v. Coolidge-Schussler Co.*, 97 Minn. 204, 105 N. W. 553. A grantor in a deed to his children, reserving possession until his youngest child reaches 21 or during the grantor's life, cannot sell growing timber on the land, *Gulf Lumber Co. v. Crenshaw*, (Ala. 1906) 42 S. 564. One who cuts timber under an oral agreement acquires title as licensee to all taken before the license is revoked, *Antrim Iron Co. v. Anderson*, 140 Mich. 702, 104 N. W. 319. The owner of land sold some standing timber retaining title till the purchase money was paid. The buyer agreed to sell the lumber when sawed to a lumber company and later joined with the company in the appointment of a receiver for the company who was authorized to take the lumber and carry out the contract. It was held that the original owner, by filing a petition asking that the receiver be instructed to pay his claim before turning over the lumber to the company, did not elect to treat the title as having passed to the buyer, *Hendrickson Lumber Co. v. Pretorious*, (Ark. 1907) 101 S. W. 733. When a contract is entered into for the sale of timber providing it shall be

measured each month and not hauled from the measuring place until it is paid for, and reserving the right to a forfeiture if the cutting is not completed within a specified time, then the right of forfeiture does not become absolute if the vendor has allowed great expense to be put into the property, and delay due to the death of the vendee interrupts the work leaving a large amount of cut timber ready to be sold, but the vendor's interest is only that of mortgagee and in equity a receiver is entitled to take possession and sell the timber cut, paying the vendor the stipulated price per foot for releases, *Baskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432. The purchaser of standing timber on a 40 acre lot under a written agreement which provided that "This deed shall continue and remain in force until" the purchaser "commence to cut and lumber the same" and for one year thereafter, and then to become void and of no effect; but the right of way—for a road, etc., "shall remain in full force," did not take a fee simple interest in the timber but had merely a right to commence logging within a reasonable time, to be determined by the court in view of all the circumstances, and continue cutting for one year only thereafter. The right of way could be used thereafter for removing timber from other lots, (Calhoon J. dissenting), *Hall v. Eastman, Gardiner and Co.*, (Miss. 1907) 43 S. 2.

Right of access. The plaintiff made a contract with the owner of land whereby he acquired the right to the standing timber to be removed within one year, and when the owner granted a quitclaim deed to a right of way across the land to a railroad, after the year had expired, the owner was not liable for injury to the plaintiff, for the increased difficulty in getting the timber to the mill, under the railroad, but as the railroad had constructed its track without the plaintiff's consent the railroad was the proper party to be sued, *Boring Lumber Co. v. Roots*, (Ore. 1907) 90 Pac. 487.

When trees must be cut. "A deed of merchantable standing timber which specifies no time for its removal conveys a terminable estate in the timber which ends when a reasonable time for the removal of such timber, after the execution of the deed, has expired," *Liston v. Chapman & Dewey Lumber Co.*, 77 Ark. 116, 91 S. W. 27. It was held that a deed which read as follows: "I have bargained, sold and released unto the H. Company, heirs and assigns, forever, in fee simple all the timber on the ninety-six acres (described): and I do hereby bind

myself, heirs and legal representatives to warrant and forever defend, all and singular, the title to the above named premises unto the said H. Co., heirs and assigns, against every person or persons whomsoever claiming, or to claim, the same, or any part thereof;" conveyed a fee simple interest in the timber without an implied limitation that it be cut within a reasonable time, *Lodwick Lumber Co. v. Taylor*, (Tex. 1906) 98 S. W. 238. When a landowner sold all the standing timber thereon and by the terms of the conveyance the grantee was allowed two years within which to cut and remove it, the title was not forfeited upon the expiration of the two year period. The seller can maintain trespass *quare clausum* against the grantee who enters after the time limit, and recover only such actual damages as he may sustain to his possession, *C. W. Zimmerman Mfg. Co. v. Daffin*, (Ala. 1906) 42 S. 858. When a contract for the purchase of growing trees provides that they must be removed within two years the purchaser by failing to remove them within the time specified loses his rights to them. "A sale of timber on a certain tract of land to be removed in a given length of time is only a sale of so much timber as is removed within the time," *Bell County Land Co. v. Moss*, (Ky. 1906) 97 S. W. 354. The grantee in a deed of standing timber which provided that he was to have "three years to remove the saw logs," after the expiration of that period has no right whatever on the premises or to the timber, either standing or cut down and left lying on the ground, *Clark v. Ingram Day Lumber Co.*, (Miss. 1907) 43 S. 813. When a holder of the oldest recorded deed to timber standing on land is enjoined from cutting, the burden of proof is on the holder of the junior title to show that a reasonable time to remove the timber has expired, considering the purposes for which the timber was bought, the distance of transportation and other circumstances, *Brinson & Co. v. Kirkland*, 122 Ga. 486, 50 S. E. 369.

Sec. 574. What trees can be cut under various instruments. In a contract conveying standing timber the descriptive words "All the pine, poplar, cypress trees now standing and growing in the swamp on the following lands" in a certain county and town and containing a certain number of acres are so indefinite as to require the aid of parol testimony to explain their true meaning and create a case for the jury, *Ward v. Gay*, 137 N. C. 397, 49 S. E. 884. A conveyance "of all the pine

trees growing and being upon 4,900 acres of land for sawmill and turpentine purposes," was applicable to those trees only that were suitable for such purposes on the date of the conveyance; and not those which by later growth came within such description, *Allison v. Wall*, 121 Ga. 822, 49 S. E. 831.

Limbs and tops. A contract for the sale "of all the timber for sawmill purposes" on a certain tract of land was construed to cover only such portion of the trees as was capable of being sawed into lumber. The limbs and tops were not included, *Pennington v. Avera*, 124 Ga. 147, 52 S. E. 324. A written agreement which states that it witnesseth that the plaintiff "has this day sold to" the defendant "a certain lot of timber situated on Rhodes Branch," etc., followed by a schedule of prices and concluding with the statement that the plaintiff "further agrees to deliver not less than 200,000 feet of all classes of timber above specified" is a contract for the sale of all the timber of the given kind, quality, and dimensions on the boundary contemplated by the parties, the minimum to be delivered being 200,000 feet, *Bradford v. Huffman*, (Ky. 1905) 88 S. W. 1057. Where a contract of sale of "all the timber and wood left on the land—after we have removed all the saw timber measuring ten inches in diameter at the stump and upwards" also provided that the buyer "shall have a period of fifteen years from the date in which to remove the said timber and wood from the said lands, and it is further agreed that (the seller) shall remove the timber aforesaid and release from this contract not less than 235 acres of land per annum;" the subsequent purchasers of the land from the sellers of the timber, who had notice of the rights of the buyers of the timber although the conveyance contained no timber reservation, as against the buyers of the timber are not entitled to an injunction to prevent the further cutting of timber over ten inches in diameter at the date of the contract, *Chemical Charcoal Co. v. Smith* (Miss. 1905) 38 S. 232.

Sec. 575. Legislative right to regulate cutting without compensation. The Legislature of Maine in 1907 asked the opinion of the Supreme Court on the constitutionality of legislation designed to preserve the water supply, the lakes, streams, and rivers, by regulating or restricting the cutting or destruction of trees growing on wild or uncultivated land without compensation to the owner. The court holds the proposed

legislation obnoxious neither to the fourteenth amendment to the Federal Constitution nor to the state constitution and says in the course of its opinion: "There are two reasons of great weight for applying this strict construction of the constitutional provision to property in land (1) Such property is not the result of productive labor, but is derived solely from the state itself, the original owner; (2) the amount of land being incapable of increase, if the owners of large tracts can waste them at will without state restriction, the state and its people may be helplessly impoverished and one great purpose of government defeated. Regarding the question submitted, in the light of the doctrine above stated (being that of Maine and Massachusetts at least), we do not think the proposed legislation would operate to 'take' private property within the inhibition of the Constitution. While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product, and increase untouched, and without diminution of title, estate, or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay, but not deprivation. While the use might be restricted it would not be appropriated or 'taken.'

"The foregoing considerations lead us to the opinion at present that the proposed legislation for the purposes and with the limitations named in the Senate order would be within the legislative power, and would not operate as a taking of private property for which compensation must be made," In re Opinion of the Justices, (Maine 1908) 69 Atl. 627.

Sec. 576. Actions for injuries to or removal of trees—Measure of damages—Injunctions.

Tresspass for cutting trees, see *post*, §§ 577, 578.

The plaintiff brought an action for damages for trespass to timberland committed by the defendants' agents cutting timber on the plaintiff's land, but the defendants were not liable for damages unless it were shown that the agent was subject to their control in respect to the means and the manner of doing his work, and that he was not at liberty to act independently for himself, *Capen's Adm'r v. Sheldon*, 78 Vt. 39, 61 Atl. 864. In a suit for damages al-

leged to have been sustained by the plaintiff by the trespass of the defendant in entering upon a tract of land and cutting timber trees, the plaintiff claiming ownership through adverse possession, it was found that the plaintiff was not entitled to the entire tract claimed, and in the absence of evidence that the trees were cut from that part of the land, to which he was entitled, a verdict awarding damages to the plaintiff could not be sustained, *Berry v. Ritter Lumber Co.*, 141 N. C. 386, 54 S. E. 278.

Evidence that stumps of trees were seen around where the defendant's wagon and team were seen standing (on the land in question) and that within a few feet of the wagon there was a tree cut into pieces, is admissible to show trespass, *Mayhall v. State*, 146 Ala. 124, 41 S. 290.

Pleading. Where an action is brought to recover land, demanding damages for the cutting and selling of large numbers of trees therefrom, it is held that the omission of a prayer for relief in the complaint does not make it demurrable, *Lassiter v. Okeetee Club*, 70 S. C. 102, 49 S. E. 224.

Damages. In an action for damages to a shade tree as the tree was part of the freehold evidence is admissible of the value of the land before and after the injury to the tree, *DelaWare, &c., Tel. Co. v. Fisk* (Ind. 1907) 81 N. E. 1100.

Injunction granted. Upon proof of his possession a plaintiff in possession of timber land may maintain an action to enjoin an insolvent defendant from cutting timber, *Fletcher v. Fletcher*, 123 Ga. 470, 51 S. E. 416. An injunction will lie to restrain trespassers from cutting down cedar trees of sufficient size to make fence posts and constituting the chief value of the land, *Hall v. Bowman*, (Ky. 1906) 90 S. W. 1051. Where an answer to a bill to quiet title to growing timber and asking for an injunction to restrain cutting merely asserts a fee simple title to the pine timber and makes no denials as to the other, the injunction should not be dissolved, *Goodson v. Stewart*, (Ala. 1907) 42 S. 1019. When the defendant threatens to continue to cut timber from day to day on property claimed by another man, an injunction may be issued forbidding the trespass, *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 50 S. E. 164. Although equity will not enjoin a mere trespass, when the plaintiff has purchased the timber on certain lands and erected a sawmill in the vicinity to saw it and the defendants have induced the plaintiff to do so by their conduct in failing

to reassert an apparently abandoned claim and it further appears that reimbursement to the extent of the market value of the timber would not fairly compensate for the injury which will be done by the threatened trespass, an injunction will be granted, *Hall v. Wellman Lumber Co.*, 78 Ark. 408, 94 S. W. 43. Where the plaintiff produces a deed in court, referring to other deeds for a description of the land, he is entitled to a continuance of an injunction ordering the defendant to stop cutting timber, especially when Acts 1901, c. 666 s. 900, are considered, *Moore v. Fowle*, 139 N. C. 51, 51 S. E. 796.

Injunction refused. Unless timber is of some peculiar value to the plaintiff, an injunction will not be granted enjoining the cutting of timber on his land unless the defendants are proved to be insolvent, *Loyd v. Blackburn*, 57 W. Va. 217, 50 S. E. 741. Although an owner has built mills to saw timber cut from land, yet equity will not enjoin the cutting and removal of the timber by one claiming to hold title who is not insolvent, *Curtin v. Stout*, 57 W. Va. 271, 50 S. E. 810. An injunction to restrain the cutting of timber will not be granted where no irreparable damage will result therefrom and the defendant is not insolvent, *Haggart v. Chapman-Dewey Land Co.*, 77 Ark. 527, 92 S. W. 792. A bill in equity asking an injunction to restrain cutting timber cannot be maintained where it appears that title to the land is in dispute, that title to the timber depends solely on title to the land, and the bill does not ask the Court to determine the title to the land, *Simmons v. Day*, (Mich. 1908) 114 N. W. 853. Where a bill to enjoin the defendant from trespassing upon the plaintiff's land and dipping turpentine from boxes in the trees on the land merely alleged "that almost the entire value of said lands consists in the said pine trees and their product, which the defendants are carrying away," and the evidence only showed two trespassers before an action at law for trespass was begun and one thereafter, no irreparable damage was shown and an injunction was refused, *Cowan v. Skinner*, (Fla. 1907) 42 S. 730. Florida Revised Statutes of 1898, section 1469, which gives the owner of timbered lands a right to an injunction to restrain a trespass thereon, is not applicable to the owner of "turpentine boxes," or of the turpentine in the trees with the right to cut, box and scrape the trees. Such a person to obtain an injunction must show irreparable damage will otherwise result, *Hall v. Horne*, (Fla. 1906) 42 S. 383.

Penalties. Under Mississippi Ann. Code 1892 section 4412 a seller of land who cuts down trees after the conveyance but before surrendering the possession, is liable for the penalties therein set forth, *Smith v. Forbes*, 89 Miss. 141, 42 S. 382. A defendant, who told his employees to cut timber on a tract without pointing out the boundary and they in ignorance cut trees on the plaintiff's land adjoining in the absence of the defendant is not subject to the penalty imposed by Mississippi Rev. Code 1892 section 4412 for cutting down trees without the owner's consent, *Smith v. Saucier*, (Miss. 1906) 40 S. 328. In an action under Alabama Code 1896, section 4137, to recover a penalty for cutting trees upon the land of another wilfully without the consent of the owner, the plaintiff has the burden of showing affirmatively lack of consent; evidence thereon examined, *Davis v. Arnold*, 143 Ala. 228, 39 S. 141.

TRESPASS

As to injury of trees, see *ante*, §576.

Owner's liability to trespasser for defective premises, see *ante*, §422.

Premises attractive to children, see *ante*, §425.

Sec. 577. What constitutes—Acts of public officers. The falling of shot and of ducks, killed by guns on defendant's premises, 325 feet from plaintiff's, amounts to trespass for which plaintiff may have an injunction, *Whittaker v. Stangvick*, 100 Minn. 386, 111 N. W. 295.

Where a village trespassed on land and built waterworks thereon before beginning condemnation proceedings it was a trespasser and the owner was entitled as damages to the value of his land as increased by the buildings wrongfully placed thereon by the village, but not for the cost or value thereof to the village, *St. Johnsville v. Smith*, 184 N. Y. 341, 77 N. E. 617. Trespass by a school board which builds a schoolhouse on plaintiff's property, see *Aldridge v. Stillwater*, 15 Okl. 354, 82 Pac. 827, reported more fully *post* §582.

Where the state engineer and his assistants, purporting to act under a New York statute providing for a survey to establish a boundary line between certain counties which had been in

dispute 100 years, went on the plaintiff's private park in the Adirondacks and cut a slash across it $3\frac{1}{2}$ miles long and from 5 to 25 feet wide as a result of which the timber cut down would not grow again for 80 years, the damage incurred was not merely incidental to a preliminary survey but constituted a trespass for which the officers were individually liable. An injunction was also issued against further trespass, *Litchfield v. Pond*, 186 N. Y. 66, 78 N. E. 719.

Sec. 578. Who may maintain an action for trespass—Title or interest necessary. In trespass there can be no examination of title and actual peaceable and legal possession is sufficient even as against the true owner who has disturbed it, *Mott v. Hopper*, 116 La. 629, 40 S. 921. In order to bring an action for trespass enjoining the cutting of timber on land, the plaintiff must show a perfect legal title, or actual possession. One deed is insufficient. Building a shanty which is never occupied is not actual possession of the lot of land and does not give a basis for an action of trespass, *Downing v. Anderson*, 126 Ga. 373, 55 S. E. 184. In trespass where the issue is title the claim of title need not be set out in the pleadings. When, however, the defendants alleged in their answer that they cut certain timber under a conveyance by one to the other they could not complain of a judgment for the plaintiff on the ground that there was no evidence to connect them with the Where a telegraph company alleges the right to enter on land of the plaintiff stringing wires and cutting down trees and trespass, *Asher v. Helton*, 31 Ky. Law Rep. 9, 101 S. W. 350. making a road under the authority of a written permit from the plaintiff the burden was on the plaintiff to prove a false and fraudulent promise as an inducement to the permit, *Mason v. Postal Telegraph Cable Co.*, 74 S. C. 557, 54 S. E. 763.

Sec. 579. Trespassing animals—Grazing rights—Damages.

Grazing rights in public lands, see *ante*, §470.

Alabama Code 1896, sections 2115 *et seq.* as to trespasses on land by animals, construed, *Ryall v. Allen*, 143 Ala. 222, 38 S. 851. A lessor of grazing lands may recover damages for the destruction of the pasturage by trespassing animals, although the pasture is not enclosed, *Painter & Co. v. Stahley Bros.*, (Wyo. 1907) 90 Atl. 375. Under an agreement

by adjacent land owners to maintain a partition fence each taking care of a stipulated part, if the hogs of the defendant enter the domain of the plaintiff, through a hole negligently left by the defendant which belonged to him to repair, he is liable to the plaintiff for the damages that such hogs may have done, *Collins v. Cochran*, 121 Ga. 785, 49 S. E. 771. Although the owner of land adjoining the highway cannot recover for a casual trespass by cattle being driven along the highway, if they escape from such land on to other land adjoining, the owner of such other land can recover in trespass, although it was unfenced, *Wood v. Snider*, 187 N. Y. 28, 79 N. E. 858. When a herd of sheep is allowed to graze on the range belonging to the plaintiffs so that the grass is eaten up and the water used at the springs, an injunction may be issued enjoining trespasses by the defendant although the plaintiff's lands are unenclosed, if the defendant has refused to remove his cattle after receiving repeated warnings from the plaintiff that he was on his range, *Musselshell Cattle Co. v. Woolfolk*, 34 Mont. 126, 85 Pac. 874.

When sheep invade a cattle range the cattle men are not entitled to an injunction against the sheep herders depasturing the range by the feeding of the sheep as the range is free to all when owned by the government, and the fact that the herder drove his sheep to water on private ground once does not constitute a ground for an injunction against the herder's pasturing his sheep on nearby public lands, although the private springs are practically the only water available, provided it is not shown that he intends to repeat the trespass, *Healy v. Smith*, 14 Wyo. 263, 83 Pac. 583.

When the defendant owned wild cattle which jumped all the fences, it was liable for damages when its cattle damaged the plaintiff's growing crops especially when it did not remove the cattle at once in response to complaints; for full discussion see Durkee v. Chino Land & Water Co., (Cal. 1907) 91 Pac. 389.

Damages. If animals trespass for part of a season the measure of damages is the loss in the value of the crops, *Cole v. Thompson*, (Ia. 1907) 112 N. W. 178. The owner of land on which sheep trespass and consume all the grass may recover damages for the loss of the grass, but not for the damage caused by the necessity of driving the plaintiff's cattle 100

miles to other pasture, owing to the loss of the grass, *Risse v. Collins*, 12 Idaho 689, 87 Pac. 1006.

An injunction will issue to protect land of plaintiff from daily trespass of cattle, *Sillasen v. Winterer*, (Neb. 1906) 107 N. W. 124.

Sec. 580. Injunctions. When the defendant had commenced the erection of a building on land claimed by the plaintiff, a temporary injunction forbidding the erection of the building until the rights of the parties were determined may be granted, *Phenix v. Frampton*, (Nev. 1907) 90 Pac. 2. A bill to enjoin a threatened trespass on the land which alleged that it would deprive the complainant of the free use of the property and prevent the manufacture of lime in his kiln when it could be done at a profit and so deprive him of profits which could not be recovered at law, states a good cause for equitable relief, *Wilson v. Meyer*, 144 Ala. 402, 39 S. 317. Equity will enjoin trespasses upon the complainant's land for turpentine purposes continued for two years after notice of his rights and having assumed jurisdiction will authorize a discovery as to the amount of profits realized by the defendants, *Coleman & Davis v. Elliott*, 147 Ala. 689, 40 S. 666. A mandatory injunction will issue to remove telephone poles so near adjoining land that the cross-bars and wires project over the fence and guy wires are actually on the land, *Cumberland Telephone Co. v. Barnes*, 30 Ky. Law Rep. 1290, 101 S. W. 301.

"The destruction of a fence and threatened repetition thereof by a trespasser as often as the fence should be replaced entitles the owner to relief by injunction against the invader, even though the latter may not be insolvent," *Munger v. Yeiser*, (Neb. 1907) 114 N. W. 166.

An injunction against trespass on land is not a bar to proceedings to expropriate it, *Xavier Realty v. Louisiana Ry. & Nav. Co.*, 115 La. 343, 39 S. 6.

One in possession of a city lot, used for buildings containing an electric plant, which furnishes light for the city, is not entitled to an injunction against the construction of a steam pipe, by permission of the city across the land occupied, *Jacobs v. Lakeside Lumber Co.*, (Wis. 1908) 114 N. W. 443.

Sec. 581. Evidence, pleadings and practice—Survival of Actions. When a trespasser objects to the jurisdiction of

a magistrate, and enters a return on the overruling of the objection, the court has obtained jurisdiction over him, *Lee v. Chaplin*, 70 S. C. 561, 50 S. E. 501.

License—Amendment of pleading after verdict. Where the plaintiff in an action in the nature of trespass quare clausum failed to prove an unlawful entry because it was made with the plaintiff's consent but did show an injury to the premises after entry, after verdict he should be allowed to amend his declaration to conform to the evidence, *Beers v. McGinnis*, 191 Mass. 279, 77 N. E. 768.

Evidence. A sheriff's deed from one not shown to have title is not sufficient to support an action of trespass, *Phillips v. Timber Co.*, (Ky. 1905) 88 S. W. 1058. In trespass quare clausum where the defendant pleaded certain deeds with profert and the plaintiff craved oyer but after they were read demurred without reciting the deeds, they were not before the court and would not be considered in passing upon the demurrer. As the declaration alleged various trespasses between October, 1903, and August 31, 1906, the date of the writ, pleas to the whole declaration based upon rights conferred by deeds which ended on April 1, 1906, were bad, *Lee v. Follensby*, (Vt. 1907) 67 Atl. 197. Where in trespass to try title the plaintiff introduced in evidence part of a list of school lands certified by the Commissioner of the General Land Office of Texas to show that he was a purchaser the defendant was entitled to introduce that part of the same list which showed that the land had been sold, *Knapp v. Patterson*, (Tex. 1905) 90 S. W. 163.

Pleadings. A description of the premises as "312 South 19th Street, in the city of Birmingham," is sufficient but failure to allege the time when the trespass was committed is demurrable. A plea which alleges that the defendant "entered upon the premises described in the complaint" under a license from the plaintiff does not allege permission to enter the "house" thereon, *Snedecor v. Pope*, 143 Ala. 275, 39 S. 318.

Survival. An action for trespass upon land against the defendant did not survive against his heirs, on the death of the defendant while the action was pending, *Sims v. Davis*, 70 S. C. 362, 49 S. E. 872.

Sec. 582. Damages. When the defendants in building a large hotel in Philadelphia acting under the orders of the building inspectors of that city made a wall of a certain thick-

ness and thereby extended it 10 inches over the plaintiff's land the latter having tacitly consented could not recover even nominal damages, *Sharpless v. Boldt*, (Penn. 1907) 67 Atl. 652. When a school board trespasses and builds a school house on land which has not been purchased and a subsequent law authorizes the school board to maintain an action to condemn land by right of eminent domain, a court may withhold a writ of ouster in an action of ejectment until the condemnation of the land by the right of eminent domain, and the owners are only entitled to the value of the land and have no right to compensation for the value of the school house to which they did not contribute, *Aldridge v. Board of Education of Stillwater*, 15 Okl. 354, 82 Pac. 827.

For making dwelling uninhabitable. In an action of trespass by a tenant against the landlord an allegation that the plaintiff and her family while occupying the premises suffered great physical pain and mental anguish, and were made sore and sick and exposed to inclement weather by the defendant's acts, charges financial damage and is not subject to a motion to strike out, *Snedecor v. Pope*, 143 Ala. 275, 39 S. 318. If a co-tenant removes the doors and windows of a house and the plaintiff then remains in the house and suffers by exposure, only the actual cost of replacing the doors and windows will be allowed as damages when the plaintiff could have had the windows and doors replaced very easily, *Davis v. Poland*, (Me. 1906) 66 Atl. 380.

Punitive damages. Double damages are prescribed for trespass on land without owner's consent by Me. Laws 1907, Ch. 135. Kansas Gen. St. 1901, s. 7862, relating to treble damages for injury to various things on land, was construed not to allow treble damages for taking gravel and mold by a railroad to build a dike which was extended on to the plaintiff's premises, *Atchison, T. & S. F. Ry. Co. v. Grant*, 75 Kan. 344, 89 Pac. 658. Where the defendant is charged with entering wantonly and with force of arms premises rightfully belonging to the plaintiff under a lease evidence is admissible to show that the defendant had possession under a parol contract for the renting of the land, and that he held under a bona fide claim of right to avoid punitive damages, *Newell v. Taylor*, 74 S. C. 8, 54 S. E. 212.

TRUSTS

Deed of trust to secure debts, see *ante*, §§412-414.

Statute of limitations as applied to, see *ante*, §513.

The statute of frauds as applied to, see *ante*, §507.

Sec. 583. Creation of express trust—Validity—Construction—Title to support action by trustee. A will giving executors power to carry on testator's plantations, to lease or sell any of his estate for the payment of his debts will be held to create an express trust, *Gordon v. McDougall*, 84 Miss. 715, 37 So. 298. The owners conveyed to certain persons in trust, a lot of land, on which to erect two academies, and a church for the use of the members of the Methodist Episcopal Church; and in further trust, stipulated that "in case of vacation by death or otherwise of a trustee or trustees, the vacancy or vacancies shall be filled by the proper authority by another trustee or trustees as the case may be." This would be a continuing trust for educational purposes, *Harris v. Brown*, 124 Ga. 310, 52 S. E. 610. Evidence that land was conveyed by father to son as agent, that the deed was never recorded and had attached to it at the son's death a statement that the property deeded him as agent he would treat as follows: "I act as agent for my family in the same. My tickets in cash drawer to come out of same," showed that the property was taken in trust and therefore out of reach of the son's creditors, *Fleming v. Wood*, 147 Mich. 513, 111 N. W. 80. Where the consideration for a deed to a daughter was her agreement to support them for life and thereafter she got assistance from one of her brothers in consequence of a paper signed by her in which she declared that she held "one undivided third" in trust for one brother and another for the other, a valid trust was created to enforce which in Pennsylvania ejectment is the proper remedy, *Lee v. Hamilton*, (Penn. 1907), 67 Atl. 780.

Construction. When a deed conveyed to "P as trustee, his successors, heirs and assigns," in fee simple a property, after-born children were not admitted to a share in the property conveyed, *Plant v. Plant*, 122 Ga. 763, 50 S. E. 961.

A warranty deed in the usual form conveyed property to a trustee and was accompanied by a written instrument appointing the grantee in the deed trustee to take and convey the property after the death of the grantor in the manner prescribed.

Held that the title passed on the execution of the deed and the limiting words designated the time when the trustee should take possession and proceed with the active performance of the trust, *Lewis v. Curnutt*, 130 Ia. 423, 106 N. W. 914.

Trust not created. Where in 1890 a grantee of a 40 acre tract signed the following: "I hereby agree to allow Charles Dexter one-half of the net proceeds of the sale of the forty acres of land (when sold)," he did not thereby constitute himself a trustee under an express trust, and Dexter who made no claim for any part of the profits of any sale until 1902, after the grantee's death, was barred by laches from claiming that the remainder of the land unsold should be treated as personal property and clear profit, *Dexter v. MacDonald*, 196 Mo. 373, 95 S. W. 359. When a husband who after buying land with money derived from his first wife's property covenanted by an ante-nuptial agreement with his second wife to convey the land to her, and did so convey it, it was held that mere declarations made by him to the effect that his children could recover the land after his death were "entirely too general and vague to manifest a solemn election on his part to hold the land as trustee for his first wife and her heirs," *Jones v. Jones*, 80 Ark. 43, 97 S. W. 451.

By separate instruments. Where a grantee in an absolute deed agreed at the same time by a separate instrument in writing to hold the land conveyed in trust, the two instruments together created a valid trust, and although the trust instrument was not recorded the beneficiaries thereunder were not estopped to enforce the trust against the trustee in bankruptcy of the grantee, even if creditors of the latter had lent him credit upon the faith of the deed, *Ellison v. Ganiard*, 167 Ind. 471, 79 N. E. 450.

Action by trustee. N. C. Revisal 1905 §404 provides that "where a person contracts in his own name but really for the benefit of another he is to be regarded as the trustee of an express trust," "therefore one of a syndicate which purchased land was not competent to sue alone on a contract with the other members mentioned as "others;" the law requiring that every action shall be prosecuted in the name of the real parties in interest, *Winders v. Hill*, 141 N. C. 694, 54 S. E. 440. The grantee under a conveyance to "J. W. Boland, agent," if an agent at all, holds in trust under an express trust and by virtue of section 21 of the Kentucky Civil Code of

Practice can sue without joining with him the person for whose benefit the action was prosecuted, *Goff v. Boland*, (Ky. 1906) 92 S. W. 575.

Validity. Under Civ. Code §857 subd. 2, 3 a trust to lease premises for a term not exceeding five years and pay the income thereof to the son of the grantor, was valid and separable from an invalid trust conferred by the deed of trust to convey on the death of the beneficiary, *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138. A executed a mortgage on his land to B, an attorney, in order to secure the payment of his debts to banks to whom B was to endorse the mortgage notes in exchange for A's prior notes. Held, evidence of the agreement with the banks was not inadmissible because tending to show a trust contrary to the provisions of Gen. Stat. 1894, Sec. 4213, providing that no trust concerning lands shall be valid unless in writing, *First State Bank of Le Sueur v. Sibley County Bank*, 96 Minn. 456, 105 N. W. 485.

Sec. 584. Founded on fraud or undue influence

Premises conveyed for the purpose of curing a defective foreclosure will be held by the person who fraudulently took title in trust for the one to whom the grantor intended to convey, *Gates v. Kelley* (N. D. 1907) 110 N. W. 770. When a patent to land is issued by mistake, fraud, inadvertence, or other cause, to a party not entitled to it, he will be declared trustee for the true owner, *Green v. Clyde*, 80 Ark. 391, 97 S. W. 437. Where the court finds certain conveyances were constructively fraudulent it should impress upon the legal holder a trust for the benefit of the constructive beneficiaries, order a conveyance by him to them and provide that if he fails to execute it a master in chancery named in the decree make the conveyance, *Stahl v. Stahl*, 220 Ill. 188, 77 N. E. 67. Where the evidence tends to establish the allegation that the defendant knowingly took advantage of the plaintiff and obtained from him title to real estate through an oral promise to pay his debts and to furnish support for him and his two sisters during life and give them decent burial after death and then defendant refused to perform his part of the contract a trust is established, *Furst v. Galloway*, 56 W. Va. 246, 49 S. E. 146. Where a debtor takes a deed to property in the name of his wife with the object of defrauding his creditors, the effect of the conveyance is to establish a resulting trust to the debtor for the benefit of

his creditors, and if only one creditor brings his claim to judgment and afterwards establishes the trust by proceedings in equity he is the only one benefited and he may establish the trust even after bankruptcy, *Tucker v. Denico*, 27 R. I. 239, 61 Atl. 642.

Evidence. Where the appellant fraudulently obtained a deed of trust and a rental contract from a widow, by reading to her copies of judgments against her husband which were barred by the statute of limitations, the deed and rental contract were obtained by undue influence and void, *Kane v. Quillin*, 104 Va. 309, 51 S. E. 353. In a bill to establish an alleged voluntary trust based upon conveyances and loans made in the name of the beneficiary, fragments of a paper signed by the alleged trustee, having no date and not addressed to the beneficiary, which recited that upon the death of the writer information might be obtained from a third person which would help in the collection of moneys lent by the trustee, was inadmissible in the absence of evidence that any person had seen the entire writing or what it contained or referred to, *McKee v. Allen*, (Mo. 1907) 103 S. W. 76.

Sec. 585. Sale and conveyance by trustee. Kentucky Statutes 1903 section 4846 as to purchasers of land from trustees construed, *Stevens v. Smith*, (Ky. 1907) 99 S. W. 1160. Gen. Laws, Ch. 46 Sec. 87, providing for notice to beneficiaries when property held in trust is conveyed, is amended by N. Y. Laws 1907, Ch. 242. Rev. St. 1905 s. 1590 was construed to permit the court to order a sale on the application of the beneficiaries of a trust with contingent remainders when all parties interested consented, *McAfee v. Green*, 143 N. C. 411, 55 S. E. 828. Where a deed for the benefit of a married woman put the property in trust with the remainder over to the children, and provided that the property should be conveyed by the trustee according to her directions, a deed by her and her husband after the death of the trustee is a nullity and void, *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728. Where certain houses were devised in trust as a home for a son, brother, sister, and nephew together with a provision that it might be sold after five years from the testator's death it was proper for the probate court to allow a sale thereof after that period where it appeared that the beneficiaries had quarreled and did not live together. Where H was entitled to the income of certain prop-

erty on B Street and the will provided for the investment of the proceeds of the sale of property on C Street, the C Street property should be sold first, although both if necessary could be sold to pay debts, *Robinson v. Cogswell*, 192 Mass. 79, 78 N. E. 389.

Where trustees holding an estate without the right to encumber it, mortgage the property by the roundabout method of transferring the property to one of the residuary legatees who mortgages it and then conveys it back to the trustees, a subsequent sale by the trustees to the mortgagee with the option of repurchase inside of three years was valid as it passed the absolute title, *Sprague v. Betz*, 44 Wash. 650, 87 Pac. 916.

When a trustee with power to sell sold and sued his grantee to enforce a lien thereon for the purchase money and the plaintiff, a purchaser of part of the land from the grantee, paid the trustee the amount of the lien on her lot but the trustee failed to enter satisfaction thereof and sold her land, she was not estopped from recovery against the trustee. Her cause of action was against the trustee, not the beneficiaries, among whom the money was distributed, *Field v. Yeaman*, 31 Ky. Law Rep. 12, 101 S. W. 368.

Application of proceeds. A deed of land, bought by a husband and wife, ran to a third person as "trustee," but did not disclose the nature or purpose of the trust nor give him authority to sell. It was held that a conveyance of the land by him could not be attacked by a grantee holding a quit claim deed of the children of the man and wife after their death, where such grantee did not show that the trustee violated the real terms of his trust; and that the fact that the husband received all the proceeds of the sale of the land and never accounted to the wife had no bearing on the effect of the trustee's conveyance, *Davidson v. Mantor*, (Wash. 1907) 89 Pac. 167.

Price inadequate. Where a trustee under a will sold some land which he was not bound to sell at a time when he knew a contest of the will was impending whereby a grossly inadequate price was received therefore from purchasers who also knew all the circumstances a decree setting the sale aside was proper, *Beall v. Dingman*, 227 Ill. 294, 81 N. E. 366.

Sec. 586. Constructive trust. The vendor who assigns a land contract or the right to payments thereunder to another

holds the legal title to the land in trust for the two parties under that contract, and such trust persists and accompanies the legal title wherever it may go, unless, indeed, into the hands of a bona fide holder for value, *Foster v. Lowe*, 131 Wis. 54, 110 N. W. 829. One who enters on land, by agreement with the owner for the cutting of timber, knowing that the owner holds under tax title, and who subsequently acquires the original title becomes a trustee for the owner and may be required to convey to him, *Petroski v. Minzgohr*, 144 Mich. 356, 108 N. W. 77. One considered a trustee for vendee of whom he had notice, see *post*, 597.

If the owner buys in his property which is being foreclosed and has a deed made out to the bank, remaining in possession of the land and selling part of it, a parol trust may be found to reconvey the land on payment in full of the debt, especially when the owner pays the taxes, *Davis v. Kerr*, 141 N. C. 11, 53 S. E. 519. A lessor of land wrote the lessee asking him to pay the taxes on the land and deduct the money from any rent due, and the lessee complied with her request, writing to the lessor that he would bid in the property at the tax sale if it did not sell too high. Under these circumstances he had no right to keep the property and the lessor had a right to redeem the property on payment of the amount of the tax deed with interest, *Frost v. Perfield*, 44 Wash. 185, 87 Pac. 117.

A widow held the property of her deceased husband in trust under the terms of his will for his children. During her life she sold part of the estate and bought coal lands which she gave to one of her children, creating a constructive trust in favor of the other children, as he had notice of the terms of the will. But when the remaining children failed to sue for forty-eight years, they were barred by their own laches, *Newman v. Newman*, 60 W. Va. 371, 55 S. E. 377. Where the parties to a suit had executed a contract whereby the plaintiff was to get a lease of coal lands and put his time into opening the mine and the defendant was to furnish the money necessary and both were to be equal partners in its ownership after the defendant's advances had been repaid, and later the plaintiff assigned the lease he had obtained to the defendant in consequence of a letter from him stating that the plaintiff had no interest until the money so advanced had been paid and then his interest was a one-half share, it was held that the defendant held the lease as trustee for the defendant to the extent of

the latter's interest, *Howison v. Baird*, 145 Ala. 683, 40 S. 94. Plaintiff may not claim that a purchaser of land from the owner holds it in trust for him on the ground that he procured the purchase by falsely representing that he held an option on the land, *Barrett v. Miller*, 144 Mich. 454, 108 N. W. 396. A husband made an oral promise in good faith to carry out the intentions of his wife, who desired to dispose of her estate by will, and through such promise abandoned such intention, and where the husband inherited as heir-at-law but died before the fulfillment of the promise, he was not a trustee ex maleficio, *Cassels v. Finn*, 122 Ga. 33, 49 S. E. 749.

Partnership real estate. Members of a partnership are entitled to a specific performance of a contract made by them with another partner holding the title to partnership real estate, to convey said estate to them, even after it has been conveyed to a third party, *Kyle v. Carpenter*, 130 Wis. 310, 110 N. W. 187.

Sec. 587. Resulting trusts—Oral promise—Title in name of another—Money furnished by another. Although a locator of public land has made final payment for it and received his final certificate, he cannot have an action to establish a resulting trust brought against him until he has received the government patent, as he does not own the title until then, *Hamilton v. Foster*, 16 Okl. 220, 82 Pac. 821. Resulting trusts have been abolished by statute in Kentucky, *Campbell v. Asher* (Ky 1905) 88 S. W. 1067.

Title in name of another. Where the naked legal title is held by one person in trust solely for another person the latter as the real equitable owner can be compelled to specifically enforce his agreement of sale, *Kuhn v. Eppstein*, 219 Ill. 154, 76 N. E. 145. When a bond for title obligated the seller to convey to the purchaser's mother, in the absence of an agreement on her part to hold the title in trust for her son or refund to him the purchase price, she took title free and clear, although the son paid the purchase price, *Irvine v. Irvine*, (Ky. 1905) 89 S. W. 193. When A under a bond for a title to land agrees to give B an interest in the land in return for a part payment on the purchase price, allowing B to take the title, B holds the land in trust for A, and although B conveys it to his wife she still holds A's share in trust as she knew of the agreement, *Miller v. Saxton*, 75 S. C. 237, 55 S. E.

310. Where the purchaser of land at a commissioner's sale gave the commissioner a written order to convey the title to a third person and the title was so conveyed it was held that Kentucky St. 1903 section 2353 was inapplicable and the purchaser was not precluded from showing that the third person actually took title as trustee for him, *McConnell v. Gentry*, (Ky. 1907) 99 S. W. 278. Where the original owner of land agreed with a third person that the latter should redeem the land which had been sold on execution and hold the title in himself to secure him in what he advanced or might advance for the purpose the third person held the title so acquired as trustee for the original owner and must reconvey to him upon the payment of the sum he advanced and interest, *Carter v. Dotson*, (Ky. 1906) 92 S. W. 600. Where A purchases the property of B at a judicial sale, and B afterwards brought a bill in equity to compel reconveyance on payment of principal and interest, alleging that A purchased and held the property in trust for him, the evidence must be very clear and convincing, *Hatfield v. Allison*, 57 W. Va. 374, 50 S. E. 729.

Money furnished by another. Where A purchased land at an execution sale for B, who furnished the money, B is entitled to a decree that A convey to him, *Beloate v. Hennessee*, 81 Ark. 478, 99 S. W. 681. Rev. Civ. Code Sec. 303, providing for resulting trusts when a transfer is made to one person and the consideration is paid by another, construed, *Sutton v. Whetstone*, (S. D. 1907) 112 N. W. 850. The widow of an occupant of land without a paper title who purchased a patent from the state with money of the estate took title for it not for herself but for the estate, *Slusher v. Slusher* (Ky. 1907) 102 S. W. 1188. A person who bought at a commissioner's sale, paid the purchase price, and caused the deed to be executed to a third person is entitled to a constructive trust in his favor, *Noel v. Fitzpatrick*, (Ky. 1907) 100 S. W. 321. A trust in land in favor of one who pays the purchase price and for whom it was agreed that the land was purchased is created by operation of law and is enforceable in spite of the Statute of Frauds, *Crosby v. Henry*, (Ark. 1905) 88 S. W. 949. If a husband has bought land in his own name, his uncorroborated evidence is insufficient to establish an express trust in favor of his wife unless it is shown exactly what part of the purchase price was paid by her, *Pickens v. Wood et al, Grim v. Talbot*, 57 W. Va. 480, 50 S. E. 818. To create a trust in

favor of one who pays the purchase price for land conveyed to another the payment must be made at the time of the purchase so as to make it one transaction, and the mere payment later for lands or improvements does not create a lien, *Butterfield v. Butterfield*, 79 Ark. 164, 95 S. W. 146. Where a testator while alive gave another person money to invest but the latter without the former's knowledge intermingled the fund with his own money and bought land therewith, the testator's legatees can claim a constructive trust in the land for their benefit, suit to enforce which is barred by the 10 year statute of limitations (Mississippi Code 1892, section 2763), *Patton v. Pinkston*, 86 Miss. 651, 38 S. 500. The plaintiff entered into an oral contract with the defendant to buy land of the Northern Pacific R. Co. with the understanding that the plaintiff should have the southeast quarter of the half section and the plaintiff paid the defendant half the first and second payments and tendered half of the third payment. A resulting trust then arose in favor of the plaintiff in the contract of purchase from the railroad, and he was entitled to an equal half interest in the land on payment of half the purchase price, *Lynch v. Herrig*, 43 Mont. 267, 80 Pac. 240.

Trust founded on oral promise. Under the express provisions of Alabama Code 1896, section 1041 an express trust in lands cannot be established by parol evidence, *Jacoby v. Funkhouser*, 147 Ala. 254, 40 S. 291. Where a daughter conveys land to her father on the oral statement that he is to hold it in trust for her, the court will enforce a constructive trust against him, based on the confidential relations between the parties, notwithstanding the statute of frauds, and it is immaterial that no fraudulent intent existed when the instrument was delivered, *Cardiff v. Marquis*, (N. D. 1908), 114 N. W. 1088. Where a father delivered back to a daughter a deed to certain land upon her promise to convey it to another daughter, both parties believing that the redelivery revested title in the daughter, the daughter held whatever interest therein she later inherited from her father as a constructive trustee to convey to the other daughter, *Crossman v. Keister*, 223 Ill. 69, 79 N. E. 58. Where a daughter obtained a deed to real estate by the fraudulent representation that she would pay off the mortgage and allow her parents to remain in their home until their death, a constructive trust was established in favor of her parents and the court directed that the daughter

make the parents a deed for life, *Crabtree v. Potter*, 150 Cal. 710, 89 Pac. 971. A had made a trade to purchase real estate of B and he made an oral agreement that C should supply the money, taking as security an absolute deed from B. After A had gone into possession and made valuable improvements C refused to fulfill the oral contract to reconvey or give A a bond for a deed, but C became a constructive trustee for A under the oral agreement and A was therefore entitled to maintain a suit for specific performance, *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634. Where land has been bought, the purchaser taking a title bond, and then orally directing that he wants the deed made out to his wife before his death, it is not sufficient to pass title to his wife, but she is a trustee for her children with the right of dower in the land, *Gentry v. Poteet*, 59 W. Va. 408, 53 S. E. 787. A defendant agreed orally not only with the creditors but with the debtor corporation represented by its directors and stockholders, to buy its property at the foreclosure sale for the sum of \$11,200 and to pay its debts which were a lien thereon, and the defendant purchased the property for \$8,000, acquired title and then refused to pay the balance of the indebtedness. There was no evidence of purpose to "chill the sale" or to purchase at less than market values. The agreement was evidently made without design to commit fraud but to make the property bring full value. An agreement with such purpose in view is valid. (cases fully cited), *Satterfield v. Kindley*, 144 N. C. 455, 57 S. E. 145. Unless fraud or mistake is claimed no extrinsic evidence will be admitted in favor of changing a deed, which is absolute on its face, into a constructive trust, although it is from a father to his daughter reciting a pecuniary consideration and the father receives the revenue from the property, *Holton v. Holton* (N. J. Ch. 1906) 65 Atl. 481.

Husband and wife. There is no resulting trust where a husband buys land and has the title taken in the name of the wife; a gift is presumed, *Van Etten v. Passumpsic Savings Bank*, (Neb. 1907) 113 N. W. 163. Evidence examined and held not to show a resulting trust in favor of a wife, *Smith v. Smith*, 201 Mo. 533, 100 S. W. 579. The evidence was examined and held insufficient to show that lands bought by a deceased husband in his own name should be declared to be held upon a resulting trust for his wife, because bought with her funds, *Holloway v. Wilkerson*, (Ala. 1907) 43 S. 731.

Although a husband pays for a piece of land from his own funds and has the deed made out to his wife it is not alone sufficient evidence upon which to decree a resulting trust in favor of the husband, *Simpson v. Belcher*, 61 W. Va. 157, 56 S. E. 211. When a grantee accepted a conveyance to himself and wife as tenants in common it is immaterial that he paid more than one-half of the consideration, as in Kentucky resulting trusts have been abolished by statute, *Campbell v. Asher*, (Ky. 1905) 88 S. W. 1067.

Trust not arising. Evidence examined and held not to show a resulting or constructive trust, *Bunel v. Nester*, (Mo. 1907), 101 S. W. 69. A resulting trust cannot arise when an express agreement in writing shows a contrary intent. The lease and agreement between a plaintiff and others under whom the defendants claim as heirs-at-law, show a relation inconsistent with a resulting trust and parol evidence in conflict therewith is inadmissible, *De Hihns v. Free*, 70 S. C. 344, 49 S. E. 841. There is no trust impressed upon land where it is conveyed by father to son in consideration of the son's promise to pay in annual instalments of necessities, *Maxwell v. Wood*, 133 Ia. 721, 111 N. W. 203. A resulting trust did not accrue when A purchased a mining claim for a less price than the sum for which B had an unexpired option on it, when B did not know of the sale until after his option had expired and was not prevented by the conduct of either the bank or of the purchaser from exercising his option. Although A was an investor in the company for which B deposited a part payment on the purchase price to procure the option, he was in no relation of confidence or trust which would require him to give B a share in the property proportional to the amount B paid under the option, *Whitmer v. Shenk*, 11 Idaho 702, 83 Pac. 775. When the evidence shows that a mother after giving money to her sons to purchase a house knew they had taken the title in their own names and did nothing about it, although there was a mortgage drawn up for them which she did not insist on their signing and said the title of the house was just as she wanted it, a resulting trust will not be established in the house for the benefit of her heirs at her death two years after the purchase of the house, *Kennedy v. McCann*, 101 Md. 643, 61 Atl. 625. A bill to declare a trust in land conveyed absolutely by the complainants' father and mother which alleged that it was intended thereby to create a trust for their mother.

that afterward one of the grantors paid the taxes and since their death the complainants have furnished the money so to do at the request of the grantee and that after its execution the grantee loaned the grantors money at various times, looking to the property as security, is insufficient to show a trust, *Jacoby v. Funkhouser*, 147 Ala. 254, 40 S. 291.

Sec. 588. Trustee dealing with trust property—Duties. Jurisdiction of Court. Where a plaintiff makes a trustee a party to a suit, and alleges in the complaint that he is interested in the subject of the action as trustee, it was within the discretion of the court to require the trustee to answer for the protection of the cestuis que trustent, *Kaylor v. Hiller*, 72 S. C. 433, 52 S. E. 120. Mass. Rev. Laws c. 148, sec. 24, which authorizes the probate court to confirm the act of a trustee, the authority of whom or validity of which has been questioned, in certain cases, construed and held constitutional, *Richards v. Keyes*, 195 Mass. 184, 80 N. E. 812. If parties holding land, transfer it to the hands of a trustee for their benefit, providing that it should be sold for \$100,000 or for less by the consent of the owners, a sale of the property for distribution of the proceeds among the cestuis may be ordered on bill in equity, where the sale contemplated by the trust deed was not made, *Allemong v. Augusta Nat. Bank*, 103 Va. 243, 48 S. E. 897. When a trustee's wife was in possession of a note and deed of trust which constituted a prior lien on the land, the presumption was that her husband, as was his duty, had paid the note for the benefit of the beneficiary out of the rents of the property, *Houghton v. Pierce*, 203 Mo. 723, 102 S. W. 553.

Expenses. Where a large farm was devised in trust for a life tenant and with a remainder over the trustee having power to convey with the consent of the life tenant could with her approval convey a lot to a real estate agent in payment for his services in having the farm connected with a city park system thus greatly increasing the value of the remainder. This expenditure should be charged equitably to both life tenant and remainderman, *Smith v. Nones*, (Ky. 1905) 89 S. W. 153. When the trustee conducting a foreclosure sale does not give bonds as required by Acts 1900, p. 128, c. 114, the trustee may be held liable for the expenses of the sale when it is set aside, but if the trustee, a real estate trust company has provision in its charter that the capital stock shall be considered a suffi-

cient security for the faithful performance of its duties, and the trustee after consulting with lawyers of good standing, makes the sale on their advice without filing a bond, the trustee is not negligent and cannot be held liable for the expenses of the sale, *Real Estate Trust Co. of Philadelphia v. Union Trust Co.*, 102 Md. 41, 61 Atl. 228.

To invest. A court of equity may authorize a trustee to bid at a foreclosure sale and take title to land sold under a mortgage held by him as trustee although the will under which he was created trustee does not authorize him to invest in land, if such authority be clearly required for the benefit of all parties in interest and for the preservation of the corpus of the trust fund, *In re Bellah*, (Del. 1896) 67 Atl. 973.

Failure to sell unproductive property. When a trustee invests money in the purchase of a farm at the price of a previous mortgage and conducts the farm at a steady loss, he cannot credit himself with the items he paid on account of the loss each year in the conduct of the business as it was his duty to sell the farm and make the loss as small as possible when he found it was a losing business and he must account for the money lost, although he may be credited with improvements such as fencing and the cost of stock, implements, and machinery, and also the taxes which he paid, *Wieters v. Hart*, 68 N. J. Eq. 796, 63 Atl. 241.

Mortgage. Where trustees under a trust of real estate worth about \$120,000, compromised with certain parties who had attacked the validity of the trust, for \$35,000, the court held that the trustees had power to borrow the \$35,000, upon a mortgage of the trust property, *Fidelity Trust Co. v. Hawkins*, (Ky. 1906) 90 S. W. 249. Trustees under a will giving them full control over testator's real estate and directing them to pay the income to his son for his maintenance have sufficient authority to mortgage the property to raise money necessary to put it into condition to be productive, *Lueft v. Lueft*, 129 Wis. 534, 109 N. W. 652.

Lease. A clause in a trust deed forbidding the trustees "to sell or dispose of" the property is not violated by a lease for 99 years, *In re Hubbell Trust* (Ia. 1907) 113 N. W. 512. A lease of city lots for a period which, according to mortality tables, would extend 28 years beyond the probable termination of the trust is for an unreasonable term and the excess will be void, *In re Hubbell Trust*, (Ia. 1907) 113 N. W. 512.

Sec. 589. Active distinguished from passive trusts—Statute of uses.

Active trust. A devise in trust to sell and divide the proceeds among the trustees and other beneficiaries, and pending the sale to hold possession, manage and lease the same, is an active trust and the interest of the trustees is not merged with their interest as beneficiaries, *Burbach v. Burbach*, 217 Ill. 547, 75 N. E. 519. Where a will appointed a trustee and provided that at the end of ten years, subject to certain charges, he was to convey the property to himself or in case of his prior decease the successor as trustee should convey to the devisees under his will or in case of his intestacy to his children, the children of a deceased child to take the parent's share, but the conveyance to be subject to his wife's dower and homestead right, he took an equitable fee subject to the charges and the trust, the other provisions being intended merely in case of his death to invest his devisees or children with the legal title freed from the trust. As the will provided that the trustee should manage, keep in repair and insure the property and pay the taxes and lease such part thereof as he deemed best, the will created an active trust, *Matthern v. Rankin*, 228 Ill. 318, 81 N. E. 1024.

Statute of uses. Where a partnership of two conveyed land to one of their number as trustee for the other member and certain third parties named in the deed with power to sell, the legal title by virtue of the statute of uses vested in the beneficiaries, not the trustee, and he therefore had no power to convey, *Everett v. Jordan*, (Ala. 1907) 43 S. 811. If any agency, duty, or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents, or to convey the estate, or if any control is to be exercised, or duty performed, by the trustee in applying the rents to a person's maintenance, or in making repairs, or to preserve contingent remainder, or to raise a sum of money, or to dispose of the estate by sale, in all these, and like cases, the operation of the statute of uses is excluded, and the trusts or use remain mere equitable estates, *Guild v. Allen*, (R. I. 1907), 67 Atl. 855.

Sec. 590. Rights of beneficiary. The evidence was held insufficient to show that the beneficiary under a deed of trust was at the time a slave and therefore not capable of being a beneficiary, *Nona Mills Co. v. Wright* (Tex. 1907) 102 S.

W. 1118. A trust deed to A for the benefit of B to secure a debt due to B, with the power of sale, does not authorize foreclosure by B, but only by A the trustee. If the instrument be regarded as a mortgage, A not B, is the mortgagee, *Brown v. Comonow*, (N. D. 1908) 114 N. W. 728. Under a deed of trust which ordered the trustee to hold the premises for the use of the trustee's wife and her children, that the beneficiaries should live thereon and use it for their support and maintenance but provided no time for the termination of the trust or for the disposition of the remainder, the trust was in force until the death of the wife and all the children had become old enough or ceased to need maintenance from the fund and the home. At its termination the children took the remainder as purchasers from the grantor, not as heirs, and a petition for partition joined in by all the children which stated which were infants gave the Probate Court jurisdiction to decree a sale for distribution. Under the Alabama Code 1896, section 3180 the Court should appoint guardians ad litem for the infants, *Edwards v. Edwards*, 142 Ala. 267, 39 S. 82.

An attorney employed by beneficiaries to obtain from the trustees the income due them which was necessary for their support and education, is entitled to a lien upon the sum decreed to be due from the trustees as income, *In re Williams*, 187 N. Y. 286, 79 N. E. 1019.

Laches. The defendant became trustee of an estate, and he managed it so that he acquired most of the estate, but the plaintiff was in almost constant communication with the defendant and yet she brought no action against him for 13 years during which she received no interest as provided by the terms of the will. She was held to have been guilty of laches and could not recover, although she did not reside where the fraudulent transactions in regard to the property of the estate occurred, *Williams v. Woodruff*, 35 Colo. 28, 85 Pac. 90. Where a beneficiary under a trust created by her father's will was a child of eleven when he died in 1865 and had no knowledge of his will until the trustee thereunder, her step-mother, died, a letter written to her by the trustee in 1892 stating that she had lost all the money left the beneficiary by her father and would therefore leave her own property to her "when she was through with it" was an acknowledgement of the trust relationship and the beneficiary was not therefore barred by laches from maintaining a bill to establish it against the trus-

tee's administrator, *Mullen v. Walton*, 142 Ala. 166, 39 S. 97.

Whether interest transferable. Under a trust deed by C to apply the income first to certain purposes and the surplus to paying off a mortgage and after this is discharged to pay the surplus income among C's children and after his death thereafter to hold a certain portion of the corpus in trust for one of the children, R, and to convey to him upon request, R has no interest subject to execution during C's lifetime, the mortgage being still unpaid, *Hill v. Fulmer*, (Miss. 1905) 39 S. 53. Where a declaration of trust recited that the trustee was "to sell and convey the same so soon as in my judgment such sale can be made for a reasonable price, for cash or on time,—unless in the meanwhile such cestuis que trust shall direct me, in writing, to sell at an earlier day, and out of the proceeds from such sale pay, first, the costs—of such sale" and divide the proceeds among three cestuis que trust, the latter took no interest in the land which they could convey, *Waite v. People*, 228 Ill. 173, 81 N. E. 837. Where a trust under a will provided that the trustee was to hold for the use of the family of the testator's son, "including himself during his life, to be used for the support of himself and family residing with him and his wife, so long as the children are under age, and remain with their parents, but, at the death of my said son the share—set apart for the use of his family is to pass and go to his children or descendants", it was held that after the death of the wife, there being no children living with the son, the latter was entitled to the rents and profits for life. The chancellor therefore properly ordered the land rented, and the rents applied to the payment of a debt owed by the son. "When the cestui que trust has any substantial right in the property that a chancellor can enforce it may be made liable for his debts, although a discretion may be given to the trustee in the management of the estate, and as to the amounts of profits therefrom to be paid the cestui que trust, this discretion is to be exercised reasonably for the benefit of the cestui que trust, or his creditors, and is always subject to the control of a court of equity," *Hubbard v. Hayes*, (Ky. 1907) 98 S. W. 1034.

Where a trustee of land bought it from the beneficiary at the latter's own price and later the seller came and stayed with the buyer several weeks it was held that he had ratified

the sale and could not maintain a suit to have the sale set aside, *Husted v. Insley*, (Ark. 1906) 94 S. W. 708.

Sec. 591. Sale under power. If, under power of sale for reinvestment, a trustee sells the trust property to his wife, the sale is a breach of trust, and is voidable at the instance of the beneficiaries, *Scottish-American Mort'g. Co. v. Clowney*, 70 S. C. 229, 49 S. E. 569.

Consent to sale. In computing the majority of the testator's children necessary under the will to sign a request to one of their number as trustee to sell, neither the trustee nor another son to whom the sale was made, may be counted, *Frederick v. Frederick*, 219 Ill. 568, 76 N. E. 856. Where a deed of trust confers on the trustee of a life estate the power to sell land, with the consent of the life tenant, and to invest the proceeds in other property, the trustee having no interest in the property other than as trustee, a deed of the property by the trustee holds, although no reference to the general power of sale conferred upon the trustee by the grantor is made in the conveyance, neither is the written assent of the life tenant to the sale attached thereto; such written assent being presented by the trustee when applying to the judge for leave to sell, and which leave was granted, *Lee v. Giles*, 124 Ga. 494, 52 S. E. 806. A power of sale contained in a trust deed from a widow and children to trustee providing that no sale should be made except on written permission from all, continues after the death of a child, and may be exercised if all living beneficiaries agree, *Easy Payment Property Co. v. Vanderheide*, (Ky. 1906) 96 S. W. 449.

What passes. When a trust deed vests in the trustee only the life estate, a power of sale of the "trust property" extends to the fee in the remainder as well as to the life estate. Therefore a duly authorized deed by the trustee conveys a good title, *Coleman v. Cabaniss*, 121 Ga. 281, 48 S. E. 927.

Resort to court unnecessary. A trustee in a deed of trust must sell lands under the powers vested in him through his deed of trust without resort to a court of equity, *George v. Zinn*, 57 W. Va. 15, 49 S. E. 904. Where a trustee was granted title to a piece of real estate "having full powers of sale in relation thereto" it was not necessary for the court to confirm a sale of the property by the trustee as it had no juris-

diction, *Murphy v. Union Trust Co. of S. F.*, (Cal. 1907) 89 Pac. 988.

Sec. 592. Spendthrift trusts.

Restraint on alienation, see further, *post* §652. Where the trustees were to pay over the income to the beneficiary "as he may need from time to time" the provision was for his personal support and comfort and cannot be subjected by his creditor to pay losses incurred by the beneficiary in a business transaction, *Parker, Holmes & Co. v. Bushnell*, (Conn. 1907), 67 Atl. 479. The testator created a spendthrift trust, providing that none of the beneficiaries of the trust should anticipate or incumber the income in any way, and that the trustees were authorized to suspend payment of the income of his wife or heirs at any time if any of them incumbered their income, and that their right thereto should cease; but when he directed that the fund should be distributed to his grandchildren on the death of either of their parents who were the testator's children, a spendthrift trust was not imposed on them. For a very full discussion of a spendthrift trust and its administration see *Sterling v. Ives*, 78 Conn. 498, 62 Atl. 948. A testamentary trust existed to pay over the income to a beneficiary for life and so much of the principal as is necessary for his support and maintenance, and whenever he shall desire to engage in any business enterprise upon notice from him to pay over the whole or any part of the principal desired; the trust is invalid as to the life tenant's creditors under N. Y. Laws 1896, p. 570, c. 547, section 71, *Ullman v. Cameron*, 186 N. Y. 339, 78 N. E. 1074. The testator bequeathed the property of three of his children to trustees to receive their shares in trust and "invest them as they may deem safe and profitable for my children" and directs that only the income without impairing the principal shall be paid, but there was no limitation over of the principal. The testator's intention was evidently to establish a spendthrift trust, although it was not clearly expressed by his scrivener, and the trust was held to be active and the corpus of the estate should remain in the possession of the trustees free from claims of creditors, and without the right of anticipation, *Shower's Estate*, in re, 211 Pa. 297, 60 Atl. 789.

Sec. 593. Revocation or termination of trusts. Forfeiture of land conveyed to trustees of a township "for the use

of a school and for no other use" is not worked by mere non-user for 2½ years, *Buck v. City of Macon*, 85 Miss. 580, 37 So. 460. Where a trust provided that one-third of the income be paid to the testator's son, one-third to his son or his wife, and one-third to a theological school, and after the death of the testator's wife and son or son's wife, the estate be conveyed to the school, the latter institution upon the decease of the testator's wife and son are, with the consent of the son's wife, entitled to a conveyance of two-thirds of the corpus at once, *Welch v. Trustees of Episcopal Theological School*, 189 Mass. 1080, 75 N. E. 139.

VENDORS AND VENDEES

Contract to convey distinguished from deed, see *ante*, §66.

Rights of vendee in possession in improvements he makes, see *ante* §259.

Mechanics liens, as to, see *ante*, §332.

Specific performance of contracts for sale of real estate, see *ante*, SPECIFIC PERFORMANCE.

Effect of deficiency of vendor's title on rights of parties, see *ante*, §499.

Sec. 594. Existence of contract—Character—Parol.

Existence. The execution, by executors, administrators, guardians and conservators of contracts for the sale of land, made by the deceased or ward, is provided for by Conn. Acts 1907, Ch. 16. An agreement to execute a written conveyance of an entire life estate subject to a right to cut wood for grantor's personal use is one for a sale and not a lease and is subject to the provisions of the statute of frauds, Ky. St. 1903, §458, *Miller v. Hart*, (Ky. 1906) 91 S. W. 698. Sec. 1243 Rev. Civ. Code, as to distinction between sealed and unsealed instruments, construed, *Gibson v. Allen*, 19 S. D. 617, 104 N. W. 275. When parties have used the mail, the mailing of a letter accepting an offer of sale, makes a complete and binding contract of sale, dating from the moment of depositing the letter in the post office, *Campbell v. Beard*, 57 W. Va. 501, 50 S. E. 747. The written acceptance of an option of sale of land ac-

ording to the terms of the agreement, although containing a request for delivery of a deed at a later date than was stated is not invalidated by a request for delay in the delivery of the deed, *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28. An option contract is transformed into a contract of purchase by the addition of the words "I agree to purchase upon the conditions prescribed by said contract and the modifications thereof" above the signature of the vendee, *Libby v. Parry*, 98 Minn. 366, 108 N. W. 299. Where a price had been agreed upon for a farm and the purchaser demanded possession by a specified time, but it was not shown that the vendor had agreed to deliver the property as desired, the contract was not completed so that the owner could bring an action for specific performance of the agreement to purchase, although the vendor accepting the vendee's offer for the farm wrote that his offer was accepted and spoke of reserving the growing crops which was not agreed to and wanted to know his further wishes in the matter, *Somerville v. Coppage*, 101 Md. 519, 61 Atl. 318.

Certainty—Description. A description in a contract to sell land "as that purchased by the defendant at sheriff's sale" was not void for uncertainty as it could be explained by oral evidence and equity would order specific performance, *Farmer v. Sellers*, (Ala. 1905 "not officially reported") 39 S. 772. The fact that the name of the purchaser is omitted from a contract to convey land, executed by a broker in behalf of the owner, does not make the contract, otherwise valid under Comp. Laws Sec. 9511, insufficient, *Stuart v. Mattern*, 141 Mich. 686, 105 N. W. 35. Letters containing an acceptance of an offer to purchase land, not containing any description from which it is possible to identify the land, and signed by the parties as individuals, when in fact they were acting as trustees of a defunct corporation, are not a sufficient memorandum to enable the court to grant specific performance against them as trustees. If any contract exists, it is the contract of the parties as individuals, but no contract does exist in this case. Where sufficient description is given in the contract, parol evidence may be resorted to to fit the description to the thing, but where the description is insufficient or entirely missing, parol evidence is inadmissible, *Heenan v. Parmelee*, (Neb. 1908) 114 N. W. 639. A contract to convey "the land and building thereon situate on the west side of the Concord River, bounded easterly by said river, westerly by the location of the Lowell & Andover

Railroad, and northerly by Church street, being a triangular lot, covered the land bounded on the west by the railroad location and the building on it, not the building and the land under it, *Cawley v. Jean*, 189 Mass. 220, 75 N. E. 614. If a description of land contained in a written option is so vague that the instrument furnishes no key to its identification, such as "I have granted to B a thirty days' option on 424 acres of land in Tattnall County," etc., neither damages for breach of the contract nor specific performance will be decreed, *Tippins v. Phillips*, 123 Ga. 415, 51 S. E. 410.

Illegal. Two parties united to purchase a tract of land under an agreement to divide up the land between them after the purchase at public auction, and the contract was valid between the parties unless it was proved to have been made for the purpose of stifling competition and purchasing the property lower than its real value, *Henderson v. Henrie*, 61 W. Va. 183, 56 S. E. 369.

Conditional. An agreement between a landowner and a railroad to convey land to it provided it construct its railroad through a certain village within a specified time, and containing a promise to deliver it a deed when the road is built and in operation, prior to which time the railroad may enter to construct and operate its road, constitutes a mere license which may be revoked by the landowner or his successors in title, upon the failure of the railroad to fulfill the conditions precedent. Seventeen years delay, the conditions being still unperformed, does not constitute a waiver of the right of revocation, *Littlejohn v. Chicago, E. & L. S. Ry. Co.*, 219 Ill. 584, 76 N. E. 840.

Parol evidence. A verbal contract between partners for dealing in land and within the statute of frauds, while executory, will be enforced where the terms under the agreement have been completely executed before the commencement of the action, *Norton v. Brink*, (Neb. 1906) 106 N. W. 668. In Louisiana parol evidence is admissible to show that when one party verbally accepted an offer of the other party to sell land the latter at once verbally withdrew his offer, *Levy v. Levy*, 114 La. 239, 38 S. 155. "A warranty is so clearly a part of a sale that, where the sale is evidenced by a written instrument, it is incompetent to ingraft upon it a warranty proved by parol. The character of the written instrument is not important, so long as it purports to be a complete transaction of itself.

and not a mere incomplete memorandum or receipt for money, or part of a transaction, when there are other parts of it other than warranties," *Lower v. Hickman*, 80 Ark. 505, 97 S. W. 681. A, having an option on land, agreed orally with B that he and C should furnish the funds for its purchase in the name of C, that in the mean time A and B should be equitable owners and that when they were able to pay it should be deeded to them. In the mean time they were to bear the expenses and share the profits from the cutting of timber and sale of the land. Held, since A had an interest in the land his oral agreement with B was unenforceable, *Tuttle v. Bristol*, 142 Mich. 148, 105 N. W. 145. A contract provided that "I hereby agree to deliver said Rancho to E" and E agreed "to take said Rancho." The delivery of the ranch must be free of tenants, and no oral evidence which is inconsistent with the agreement will be considered, although the vendor wishes to introduce evidence that an oral agreement was made whereby the tenants should be allowed to remain in possession, *Pierce v. Edwards*, 150 Cal. 650, 89 Pac. 600. When a few acres of a large tract have been sold by A to B on a parole agreement, and A afterwards wishes to sell the whole tract to C; then if B agrees to allow the compensation for his property to be fixed by arbitration, B is bound, although the agreement to arbitrate is not in writing, especially when A has sold to C the whole tract relying on the agreement, *Pollock v. Pegues*, 72 S. C. 47, 51 S. E. 514.

Of exchange. A contract whereby A "sells" land to B and agrees to take "as part payment" other land is a contract for exchange under the code, *Steere & Ballah v. Gingery*, (S. D. 1907) 110 N. W. 774.

Sec. 595. Consideration. The payment of a \$50.00 commission and the extinguishment of an alleged liability upon a warranty deed furnishes good consideration for a contract to sell real estate, *Kelly v. Keith*, 77 Ark. 31, 90 S. W. 150. If a man agrees to make a deed of a lot of land after he has sold certain other lots but the vendee does not agree to pay the price named, then it is a unilateral contract and not binding on the vendor, *Cooley v. Moss*, 123 Ga. 707, 51 S. E. 625. The consideration for a contract in the civil law, unlike the common law, must be not merely nominal but serious. A gas and oil lease, therefore, wherein the lessee reserves the right of retiring from

the contract upon the payment of \$2, is void, *Murray v. Barnhart*, 117 La. 1023, 42 S. 489. A lease for one year at a fixed rental to a city for installing a lighting plant is sufficient consideration to support an option to the city to continue from year to year, or buy at a fixed price, *Overall v. Madisonville*, (Ky. 1907) 102 S. W. 278. Where a grantor conveyed land to the children of a son under an agreement with the son that he should pay the sum of \$500.00 as he made it "out of the land" to his sister, the making of the deed directly to the children instead of directly to him was immaterial. The conveyance of the land to them was a sufficient consideration to support the son's promise to his father. The conveyance by the children of the same land to the defendant, within a short time, strongly tends to support this view of the transaction, *Faust v. Faust*, 144 N. C. 383, 57 S. E. 22.

Sec. 596. Construction of contract—Particular agreements. A vendee may not have relief in equity for a deficiency in the quantity of land conveyed where a portion of that included within the bounds of the deed was in the open possession of a third party and the land was examined by the purchaser before buying, *Rich v. Scales*, 116 Tenn. 57, 91 S. W. 50. A devise upon condition that the devisee pay \$100 annually to a third person for life, the payment being made by the provisions of the will a charge upon the land, passed an absolute title subject to a specific lien the remedy for the enforcement of which would not be forfeiture of the title but foreclosure of the lien. Upon the facts, including the oral evidence which explain the circumstances a certain contract of sale entered into by the devisee and a purchaser contained an agreement by the latter to assume the payment of this charge upon the land, *Ditchey v. Lee*, 167 Ind. 267, 78 N. E. 972. When A entered into a contract with B whereby A was to sell lots for over \$145 per lot and deposit the money less a 5 per cent. commission in the bank to B's credit, and further providing that A should purchase all the lots remaining unsold at the expiration of six months at \$145 per lot for the whole tract, the relations between A and B were those of vendor and vendee and B was not bound by a contract of sale executed by A to C for which A did not turn the money over to B, *Monk v. Duell*, 41 Wash. 403, 83 Pac. 313.

Right of inspection. Under a contract for exchange of

land, subject to inspection, "the property may be rejected in good faith because unsatisfactory, and the grounds of rejection cannot be inquired into," *Stotts v. Miller*, 128 Ia. 633, 105 N. W. 127.

Sec. 597. Nature of vendee's interest—Tender of deed—Effect of lease. A vendor made a contract to sell his land for \$1,500 and his wife signed it but did not acknowledge it as required by law. When the vendee tendered payment and demanded a deed, the vendor's wife refused to sign unless she were paid \$500 for her dower rights, and the vendee refused twice to accept a deed from the vendor, but as time was not of the essence of the contract, the vendee could demand a conveyance after the time mentioned had expired, and when the vendor and his wife executed a deed to a third party with notice of the prior agreement, the third party held in trust for the vendee and he had a right to a conveyance by them, but he should pay for the wife's right of inchoate dower a reasonable sum, *Saldutti v. Flynn*, (N. J. Ch. 1906) 65 Atl. 246. One holding an executory contract for the sale of land giving him the right to possession has a title paramount to an adverse litigant who files a subsequent notice of lis penens. If the title is unmarketable he may rescind the contract and recover back his payment on account of the purchase price, *Moulton v. Kolodzik*, 97 Minn. 423, 107 N. W. 154.

Tender of deed. Although the vendor's agent stated that he had a deed in his pocket, it was not a legal tender of the deed when he did not give the vendee a chance to examine it, *Lefferts v. Dolton*, (Pa. 1907) 66 Atl. 527. Where \$1,000 has been paid in cash and a note for \$2,500 has been given as part payment for a mine, a tender of a deed to the mine must be shown and when there has been no such tender and the plaintiff accepted a deposit from other parties who wanted to purchase the mine, he is barred from bringing an action on the note, *Menzel v. Primm*, (Cal. 1907) 91 Pac. 754. A vendor accepted a payment on a contract to purchase real estate six weeks after the payment was due and within three weeks he brought suit to forfeit the contract without tendering a deed and although the terms of the contract read that the purchaser "shall first pay" the purchase money, that provision did not release the owner from the duty of tendering a deed as both parties were considered mutually in default after the time for

performance unless there was an offer to perform the contract by one of the parties, and a suit could not be brought until after such an offer was made, *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184.

Mere negotiations. The plaintiff and another began negotiations for the purchase of timber. Before the negotiations were terminated the other had acquired a fifth interest therein and the defendants were also allowed to come into the trade "and were to take a two-fifth interest." The trade was closed, and a deed was made in which the five names appeared in accordance with the terms of the agreement: this deed was later destroyed and another was made striking out the name of the plaintiff, but without his authority and against his consent. Within a few days thereafter the land was sold realizing \$13,000 profit and plaintiff sues for his share of one-fifth. Mere negotiations for a contract do not vest any right in the negotiator. One does not acquire an interest either legal or equitable merely by beginning negotiations. A promise based upon the consideration that the plaintiff should be admitted into the negotiations at this stage would be nudum pactum, *Allen & Holmes v. Powell*, 125 Ga. 438, 54 S. E. 137.

Creation of trust. Where A purchased a piece of property from B, knowing of an agreement between B and C whereby B agreed to sell to C, A may be considered a trustee for C and may be compelled to deliver the property to C, *Smith v. Umstead*, (N. J. Ch. 1906) 65 Atl. 442.

Effect of Lease. A contract for the sale of land is rescinded by failure to pay purchase money and taking of lease, *Marsh v. Despard*, 56 W. Va. 132, 49 S. E. 24. Pending the execution of an agreement to convey land the grantee leased the premises with the knowledge of the grantor. Subsequently it appeared that the grantor was unable to give a satisfactory title and the contract was rescinded. Held, the delivery of the lease, with the rent paid, was a sufficient restoration of the property, *Fagan v. Hook*, (Ia. 1905) 105 N. W. 155. Where A pays down a specified sum and thereafter a certain amount annually on the purchase price for land for 10 years, A is not a lessee although that term may be used in the agreement, but A is the vendee and entitled to a repayment of the purchase money if a rescission of the agreement is sought owing to default in paying the installments. But if rescission were obtained A could fairly be charged with a reasonable rent, although A has

a right to allowance for improvements made on the property, *Lytle v. Scottish American Mort. Co.*, 122 Ga. 458, 50 S. E. 402.

Sec. 598. Fraud and Misrepresentations—Mistake.

A vendor of land is liable in an action for fraud to his vendee by his false representations of title made with intent that they shall be relied upon, if relied upon to the vendee's injury, although the latter made no search to verify the title in the public records, but representations of title to be false in the actionable sense must have been made either with actual knowledge of their falsity or under such circumstances that the law will imply knowledge, *Curtley v. Security Savings Society*, (Wash. 1907) 89 Pac. 180. A represented to B, C, and D that he had an option for the purchase of certain coal lands and he obtained an advance of \$20,000, and then a further advance of \$36,000 after he had obtained a contract from E to purchase the property for \$100,000. E agreed to pay the owners \$35,000 for it and he gave A credit for a \$15,000 payment although A only paid \$100 on the contract. When B, C and D urged A to make the further payments for which he had collected the money, he refused, claiming to have paid \$40,000, but the other parties interested in the purchase were justified in purchasing the property from E to protect it from tax liens and A had no rights in the property unless he repaid the money advanced to him, *Slater v. Gribbel*, 41 Wash 168, 83 Pac. 19. In a suit to set aside a contract as a cloud on title the evidence was held not to support the allegations therein contained of conspiracy on the part of the broker and purchasers in making the contract and recording it. It was proper for the broker to obtain a re-execution of the contract which was originally executed by a sub-agent. An erasure and interlineation in the power of attorney will be presumed to be incidental to the making of the contract in the absence of evidence of fraudulent intent. A contract for the sale of land at \$44 an acre was not so unconscionable as to warrant equity in refusing to order specific performance simply because the seller was later offered \$50 per acre therefor, *Kilpatrick v. Wiley*, 197 Mo. 123, 95 S. W. 213.

Intoxication. If the defendant had signed a contract to purchase land when he had been drinking, the burden of proof was on the plaintiff to prove that the defendant knew what

he was doing and that he was not utterly deprived of his reason and understanding, and any degree of intoxication which fell short of this furnished no ground for a release, if no fraud was shown, *Fagan v. Wiley*, (Ore. 1907) 90 Pac. 910.

Misrepresentation as ground for rescission. The representation of an administrator that a street is 60 feet wide whereas it is but 24 feet is such false representation as entitles purchaser to rescind without proof of actual damage, *Greiling v. Watermolen*, 128 Wis. 440, 107 N. W. 339. Where a grantor represents that he owns a certain tract of land and without fraudulent intent conveys by a deed containing a very intricate description a tract which he represents to be the tract of land shown to the grantee but which is in reality a different tract of land, a rescission of the contract may be made and the deeds cancelled, *Shaw v. O'Neil*, (Wash. 1906), 88 Pac. 111. Plaintiff showed defendant five lots of land as the lots which defendant was to purchase. The agreement in writing to convey contained a description of four of the lots and of another lot which defendant had not seen, but which was of equal value with the fifth lot shown to defendant. Held, that defendant had a right to rescind the contract, as that right did not depend upon relative values, "but solely upon whether he was to get under the terms of the contract what he believed he was trading for," *Selby v. Matson*, (Iowa 1908) 114 N. W. 609. When the plaintiff has made an exchange of real estate for oil stock, he has no right to rescind the transaction because the defendant did not inform him that he was selling his own stock if it was shown that the plaintiff relied on his own examination of the property in purchasing, *Spinks v. Clark*, 147 Cal. 439, 82 Pac. 45. If an owner of real estate has been induced by fraudulent representations and undue influence to sell his property while he was mentally incapacitated, he may maintain an action to rescind the sale if he offers within a reasonable time to return all the consideration, and the fact that he did not pay the consideration into court did not preclude the maintenance of the action. He has also a right to use the money so paid to him after the defendant has refused to accept it and such use does amount to ratification, *Green v. Duvergey*, 146 Cal. 379, 80 Pac. 234. Where the individual members of a firm by agreement conveyed their land to one of their number who agreed to assume all the debts and reconvey a part to a third person who had a claim thereon, the

member who received the conveyance in pursuance of the agreement, and had made the return conveyance to the third party and mortgaged the remainder to raise money to pay the debts could not have the contract rescinded against the third party on the ground that the latter had refused to make certain agreed payments, *Bray v. Carroll*, (Ark. 1907) 100 S. W. 744. A vendee purchased land in 1892 paying a part of the price in cash giving notes for the balance and receiving a bond for a deed. When the last note fell due the vendee filed an equitable petition against the vendor seeking to have the note cancelled and the contract rescinded because of the alleged false representations and promises by the vendor as to the satisfaction of a mortgage given by the vendor to another. The vendor filed a cross-bill and prayed for judgment on the note. In May, 1899, a decree was ordered that the vendor recover from the vendee certain amounts and the court issue execution for said sums upon the filing with the clerk of court of a good and sufficient warranty deed in fee simple to the lots therein described. The vendor filed the deed but the vendee refused to accept the conditions and filed another equitable petition seeking injunction, alleging that the title was defective because of an interest which certain minors had in the property; the injunction was granted. The vendor died and another who had become the assignee sought to collect the judgment. The vendee alleged depreciation in the value of the property between the time of purchasing and the decree of 1899 against which the court ruled, *Horne v. Carstarphen*, 128 Ga. 193, 57 S. E. 238. A fraudulently gave an option to B on his property in order to enable B to represent himself as a man of means, and B represented to C that he was buying the property for much more than the real price, and induced C to form a corporation with him which secured an option by a payment of \$50,000 by C for which A fraudulently gave a receipt for \$125,000 to enable B to represent that he put in \$75,000, whereas the real consideration was only the \$50,000 paid by C. In an action for a rescission of the contract C was entitled to receive credit for all he expended managing the farm when A received the income of it, *California F. & F. Co. v. Schiappa-Pietra*, (Cal. 1907) 91 Pac. 593. The plaintiff bought a fruit farm and claimed the defendant represented to him that the trees were fine healthy trees and free from scale, but when he negotiated with the defendant to obtain a reduction of the pur-

chase money mortgage on account of the scale and continued to gather the crops on the farm it amounted to an election not to demand rescission, and a subsequent bill for rescission put in after a further advance of the scale, was not granted, *Du Bois v. Nugent*, 69 N. J. Eq. 145, 60 Atl. 339.

When misrepresentations immaterial. If there were fraudulent representations as to the amount of coal lying beneath a tract of coal lands, it would not invalidate the sale provided the purchaser bought on his own judgment, and after warning that there was less coal than represented, *Cork v. Cook*, 56 W. Va. 51, 48 S. E. 757. Where the buyer of a fruit farm after being fully acquainted with the falsity of representations made by the seller hires an agent to care for, and dispose of the farm products and to account for the net proceeds, he has thereby ratified the sale, *Stackpole v. Schmucker*, 225 Ill. 502, 80 N. E. 314. Although the amount of wood on a farm was falsely represented to the purchaser, he was not entitled to a rescission of the contract when he mismanaged the farm so it deteriorated in value after he knew of the fraud, but he was entitled to a perpetual injunction against the collection of the part of the purchase money note which represented the amount of woodland falsely represented to be on the farm, *Sipola v. Winship*, (N. H. 1907) 66 Atl. 962.

Mistake. When a real estate agent undertakes to point out certain lots to a purchaser which are overgrown with trees and bushes so it is impossible to find the stakes, the broker is liable for damages if the purchaser, relying on his representations, erects improvements on the lots which prove not to be the land sold, and the broker is liable although he made such representations in good faith, *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559.

Sec. 599. Auction sale. Purchaser of land at public sale is relieved from his bid if defect which exists in title was not shown by notice of sale by N. J. Laws 1906, Ch. 144, amending Act of Mch. 27, 1874. Where a county advertised certain real estate for sale at auction and the plaintiff was the highest and best bidder at the auction, the county was not compelled to sell the property to the plaintiff when the county officer at the auction refused to accept the bid on the ground of inadequacy, *McPherson Bros. v. Okanogan County*, (Wash. 1907) 88 Pac. 199.

Sec. 600. Purchase money—Recovery of—Interest.

A plaintiff is only entitled to recover money paid upon an oral contract for the sale of land repudiated by the defendant on condition that he shows that he himself was not in default, *Cave v. Osborne*, 193 Mass. 482, 79 N. E. 794. Where the vendee going into possession is evicted by a stranger with a superior title, equity enjoins the collection by the vendor of the purchase price of the lot of land, *Harvey v. Ryan*, 59 W. Va. 134, 53 S. E. 7. A devisee of land charged with the payment of unpaid purchase money thereon is not a purchaser for value but the testator's personality is exonerated from its primary liability for such purchase money, *Gordon v. James*, 86 Miss. 719, 39 S. 18.

Recovery of money paid. A vendee under a written executory contract for the sale of land may recover back a payment made on account of the purchase price when the vendor is unable to give a title as agreed and the vendee has no equitable title which he must convey back to the vendor, *Miller v. Shelburn*, (N. D. 1906) 107 N. W. 51. Where the vendor believed he was selling a lot located elsewhere, which the vendee would not have bought, and the vendee believed he was buying a lot dedicated to and owned by the city as a street, the vendee is entitled to recovery of the purchase money from the vendor, especially where the lots were not definitely indicated or the streets plainly marked so a mistake was very easy to make, *Lee v. Laprade*, 106 Va. 594, 56 S. E. 719.

Interest. Where a title bond fixed no time for a tender of a deed and an abstract of title, the purchaser is liable for interest on the purchase money from the date he took possession although the sellers had not tendered a sufficient deed, *Hatcher v. Fitzpatrick*, 31, Ken. Law Rep. 120, 101 S. W. 933. When a vendor puts the vendee into possession of land with a contract to execute a deed on payment of the first installment of the purchase money, the vendee is liable for interest on the whole amount, although no deed is made, if he has not tendered the purchase money, *Hoard v. Huntington & B. S. R. Co.*, 59 W. Va. 91, 53 S. E. 278.

Deduction for defect in title or area. When a purchaser in possession under a contract for sale after learning that the seller had not a perfect title because a remote vendor many years before conveyed the coal rights in the land continued in possession and so changed its value by selling off timber as to

decrease its desirability to the seller, the purchaser in an action by the seller for the purchase price is not entitled to a rebate on the contract price because of the defect in title. By his laches, as well as his active conduct and treatment of the property, he has elected to take the title as it is, and will be held to look to the warranty of his grantor for redress in the event his present fear of molestation from the owner of the coal privilege becomes an actual damage to him, *Johnson v. Green*, (Ky. 1906) 92 S. W. 939. If land was described in a deed as 333 acres in the southeast corner of a lot of land, the number of acres is of the essence of the contract, and the grantee is entitled to a corresponding reduction in price if the number of acres is less than represented, *Strickland v. Hutchinson*, 123 Ga. 396, 51 S. E. 348.

A vendee of real estate who assumes to pay a usurious debt on the property cannot set up usury as a defense without the consent of the vendor, as the defence of usury is personal with the original debtor, *Chenoweth v. Nat'l Bldg. Association*, 59 W. Va. 653, 53 S. E. 559.

Sec. 601. Title in compliance with contract of purchase.

Titles sufficient. A lien which may be paid out of the purchase money to be paid for land simultaneously with the delivery of the deed does not make an otherwise perfect title unmarketable, *Woodman v. Blue Grass Co.*, 125 Wis. 489, 104 N. W. 920. Where the vendor executed a contract of sale of land describing the boundary at 19½ perches on one line, when the deed by which he derived title only made that boundary line 10½ perches the purchaser was bound to take the title as the vendor could convey the whole amount of land when he had occupied it for over 30 years and when a reversal of the calls of the deed gave a correct description of the land containing as much as the vendor had agreed to sell, *Newbold v. Condon*, 104 Md. 100, 64 Atl. 356.

Titles insufficient. In a summary proceeding to enforce payment under a judicial sale the affidavits filed were examined and held not to show a marketable title, *Wanser v. De Nyse*, 188 N. Y. 378, 80 N. E. 1088. A contract calling for a "merchantable" title is not fulfilled where there is a fairly debatable question as to whether certain interests in it have been extinguished, *Howe v. Coates*, 97 Minn. 385, 107 N. W. 397.

By adverse possession. An agreement to convey by warranty deed, with abstract showing good title, is not satisfied by the offer of a title based on oral evidence of adverse possession, *Fagan v. Hook*, (Ia. 1905) 105 N. W. 155.

A party to a contract for the exchange of land under which the other party is bound to show a good title within 30 days, time being expressly made of the essence, is not in the absence of proper evidence furnished him within that period obliged to rely upon the presumption that the title is good because based upon 53 years undisputed possession under a deed. An affidavit that certain persons were the only heirs contains a mere statement of a conclusion of law and is defective because it fails to name the heirs specifically, *Clark v. Jackson*, 222 Ill. 13, 78 N. E. 6. Where a suit is brought for breach of a contract to purchase land, it cannot be enjoined because of a cloud on the title of possible curtesy rights, when the grantor and grantee had held possession for thirty years since the deed was executed by their remote women grantors, as the presumption is that the land is not subject to curtesy, and that the title is valid, *Dunn v. Stowers*, 104 Va. 290, 51 S. E. 366.

Estoppel. In an action for the specific performance of a written contract to purchase a half interest "in remainder, reversion or of whatever nature the same may be" compliance cannot be refused, on the tender of a proper deed, on the ground that the title is not good where the defect was known when the contract was made, *Ewart v. Bowman*, 70 S. C. 357, 49 S. E. 867.

Expenses. When the plaintiff sued under a breach of warranty in the title of land, she was not entitled to claim attorney's fees or traveling expenses in addition to the amount due under the warrant clause, (see Civ. Code 1895 s. 3797), *Lampkin v. Garwood*, 122 Ga. 407, 50 S. E. 171.

Defect in chain. In Louisiana the non registry of a prior deed in the chain of title does not affect the defendant's title and he may add his grantor's possession to his own for the purpose of prescription, *Moullierre v. Coco*, 116 La. 845, 41 S. 113. A deed in a chain of title had not been duly attested so it could be recorded, but that was no ground for the refusal of a subsequent purchaser to complete his contract to purchase, provided the validity of the vendor's title was not affected nor rendered legally insufficient, *Cowdery v. Greenlee*, 126 Ga. 786, 55 S. E. 918. When a deed executed by commissioners in

regular proceedings under the order of the court has been lost and the commissioners merely have to make another deed, the absence of the deed did not constitute a defect in the title sufficient to allow a purchaser to break his engagement to buy the property, especially when the defect has subsequently been made good, *Sutton v. Davis*, 143 N. C. 474, 55 S. E. 844.

Sec. 602. Performance and breach—Damages.

An agreement for the sale of land contained a provision that a strip should be dedicated for a street. The city refused to accept and the grantee refused payment. In an action by the grantor to foreclose a mortgage given as part payment it was held that he should not be compelled to secure action by the city but that grantee might set off his claim for damages, *McCormick v. Merritt*, 131 Ia. 160, 105 N. W. 428. The prospective purchaser of land wrote: "I wrote you that I would take the land.—You wired that I could have it. The option contract that you enclose me is identical like the earnest money contract which I send you for your signature.—Inclosed find \$50. Same to apply on the purchase, and the balance, \$550, to be in cash on or before 30 days.." The vendor wrote: "I have your favor inclosing check for \$50 being earnest money. I sent you option contract yesterday, which kindly return and I will then execute it and return it to you." No formal contract was executed. Held, the letters constituted a contract of which time was not the essence so that it need not be completed within 30 days, *Hobart v. Frederiksen*, (S. D. 1905) 105 N. W. 168. An option contract provided for the payment of \$22,500 for the property, of which \$8,500 was paid at the time the contract was executed, the balance to be paid as soon as a receipt could be obtained from the Land Office. If vendee failed to make the deferred payment all his rights in the contract should cease. Held, that as time was of the essence of this contract vendor could not be compelled to convey after vendee's failure to pay as stipulated, and in the absence of fraud or other ground for a rescission of the contract payments already made will be forfeited, *Hanschka v. Vodopich*, (S. D. 1906) 108 N. W. 28.

Forfeiture by mere delay. Where the date of payment of the agreed price is not fixed in a contract for the delivery of a deed to shares of land, payment is due at once, and delay invalidates the contract, *Martin v. Thomas*, 56 W. Va. 220, 49

S. E. 118. An agreement reciting that if the title were not good and could not be made so the agreement should be void becomes void at once on failure of vendor's wife to join in the conveyance, *Schwab v. Baremore*, 95 Minn. 295, 104 N. W. 10.

Notice necessary. A contract for the sale of land provided that after default it might be revived in writing at the option of the vendor. Held, the commencement of a suit was a sufficient notice of the exercise of the option, *Foster v. Lowe*, 131 Wis. 54, 110 N. W. 829. A breach of a contract secured by a bond to "protect" certain lands against any sale under a judgment can be shown although no notice of the suit was given, *Mettlar v. Conover* (N. J. Ch. 1907) 65 Atl. 464. "A party who has neglected to enforce the provisions of his contract providing that time shall be of the essence of the contract at the time the default is made, and accepts performance of the terms thereafter should not be allowed, upon a subsequent default, to enforce the provision without giving the other party notice that he intends to enforce the same and a reasonable opportunity to comply with the terms of the contract," *Keator v. Ferguson*, (S. D. 1906) 107 N. W. 678.

Waiver. Where the owner of a leasehold contracted to sell it upon the payment of a note in installments together with "such lease rent and repairs, insurance and interest that may accrue" he may not declare a forfeiture for non payment of any of these latter items where he has collected 31 installments on the note and never before demanded any further sum, *Tetley v. McElmurdy*, 201 Mo. 382, 100 S. W. 37. It was held that a condition precedent to the purchase of certain land that the buyer should deposit a certain sum in a bank within a certain period was waived by the seller's refusal to carry out the contract at all. A mutual agreement for an extension of the time of closing a sale is valid though not in writing. An allegation in a bill for specific performance by the buyer that he was ready, eager, and willing to comply with the terms of said contract is a sufficient allegation of ability to perform, *Kissack v. Bourke*, 224 Ill. 352, 79 N. E. 619. Where a farm was sold by the acre and each party gave the other a bond in the penal sum of \$1,000 to cover any variation over or under the number of acres which both parties thought it contained, upon a deficiency appearing upon a survey the buyer could waive his rights under the bond and sue upon the covenant of the seller

to refund for any deficiency, *Wolcott v. Frick*, (Ind. 1907) 81 N. E. 731.

Measure of damages. Where a contract for the sale of a leasehold provided for conveyance on payment of the purchase price, the seller, the buyer having paid part and gone into possession, cannot sell the land publicly and hold the buyer for the balance. Such a right exists as to personal property only, *Swartz v. City & Suburban Realty Co.*, (Md. 1907) 67 Atl. 283. After rescission of a contract for the exchange of land and personal property the owner of the latter may recover the reasonable value of the property which has been disposed of by the other party, *Fagan v. Hook*, 134 Ia. 381, 111 N. W. 981. A vendor under a written contract to convey land had only an undivided half of the property; but entered into the agreement in good faith upon the co-tenant's verbal promise to convey. Afterward the co-tenant refused to convey, and prevailed upon the vendor to convey his interest to him. In an action by the vendee for damages for breach of the contract, held that even if the vendor acted in good faith, the measure of damages is the difference between the value of the land at the time of the breach and the price he contracted to receive, and in addition the vendor may recover back the amount advanced upon the purchase price, *Beck v. Staats*, (Neb. 1908) 114 N. W. 633.

Where one agrees to buy and convey land to another upon the payment of the purchase money, and the vendor refused to carry out the terms of the contract and then died, recovery should be for the value of the land at the date of the tender and demand for title, with interest from that date less the subsequent depreciation, if any, due to the action of the plaintiff, *Kean v. Landrum*, 72 S. C. 556, 52 S. E. 421. A purchaser of land under a contract whereby time was made of the essence of the contract paid the first installment and tendered the second installment, which was receipted for on the contract, and afterwards returned to them on account of a suit pending in regard to the title to the land, and the agent said he would not accept the third payment, but would notify the plaintiffs when the contract would become due. He sent a letter to one of the plaintiffs, enclosing a sealed envelope which he asked him to deliver to the other plaintiff, and when it was not delivered until nearly 30 days, the thirty days' notice to pay the installments due on the property or forfeit the contract which was

contained in the envelope, did not give the plaintiffs sufficient notice and the defendant was liable for damages for a breach of the contract. The difference between the valuation of the property at the time of the refusal to convey and the unpaid purchase price constituted the damages, *Neppach v. Oregon & C. R. Co.*, 46 Ore. 374, 80 Pac. 482. In an action for a breach of a contract to sell timber it was held proper to instruct the jury in estimating the damages to consider the difference, if any, between the cost of fuel from the timber in question for operating the plaintiff's factory during the time the contract was to run and the cost of fuel obtained elsewhere at the cheapest and most economical price obtainable, *Barnes v. F. Weikel Chair Co.*, (Ky. 1905) 89 S. W. 222. Where the vendor agreed to sell to vendee timber at a certain price, and agreed to buy from him lumber cut therefrom at a certain price, and after vendee had moved his mill upon the land for the purpose of cutting the timber, the vendor prohibited the vendee from cutting the timber and the vendee thereby lost the profits, it was held that the vendee was entitled to recover for the profits but not for the expenses of the business, *Civ. Code* 1895, §3798, *Anderson v. Hilton & Dodge Lumber Co.*, 121 Ga. 688, 49 S. E. 725. A bank made a contract with A to convey him another piece of land in return for a strip on which a building owned by the bank had encroached, but the bank did not fulfill its agreement, conveying the building and the strip of land to C without making a conveyance to A. This was evidence of bad faith on the part of the bank and under Civil Code §3306 he was entitled to recover the market value of the property which the bank agreed to convey, *Messer v. H. S. & L. S.*, 149 Cal. 122, 84 Pac. 835.

Liquidated damages. Although a contract for the exchange of real estate provided that \$1,500 should be the liquidated damages in case of the failure to complete the agreement, a party can not claim the damages if his title is defective, *Denser v. Gunn*, 74 Kan. 748, 87 Pac. 1132.

Sec. 603. Recovery of damages for injury—Loss by fire. Vendors who have possession of property after the title has passed and with the permission of the vendee are liable to him for damage by fire due to their negligence, *Kincheoole v. Smith*, (Ky. 1906) 91 S. W. 1145. After the owners of land had granted an option for the sale of it, they cut a large

amount of timber from it and the optionees notified them of their election to purchase. The damages for the cutting of the timber should be assessed in favor of the optionees as of the time when the vendors had cleared the title and were able to convey the property, *McCowers v. Pew*, 147 Cal. 299, 81 Pac. 958.

Loss by fire. After the execution of a contract for the sale of premises the loss by fire of a building thereon falls on the purchaser, *Woodward v. McCollum*, (N. D. 1907) 111 N. W. 623. Where in Massachusetts after a contract of sale of land and buildings and before the conveyance the buildings, being a material part of the property in value, burned down without any fault of the owner or the buyer, the parties are excused from further performance, *Wells v. Calnan*, 107 Mass. 514, was followed and the court refused to consider decisions from other jurisdictions, *Hawkes v. Kehoe*, 193 Mass. 419, 79 N. E. 766.

Sec. 604. Forfeiture—Recovery of money paid or of deposit.

Recovery of money paid. Under the Louisiana Civil Code sections 2492 et seq. an error in the quantity of land sold does not give rise to an action for the rescission of the sale on the part of the seller, but only to an action for a supplement of the price, *Citizens Bank v. Lenoir*, 118 La. 720, 43 S. 385. If a vendor of land has represented that there has been no prior contract made to sell the land, he is not entitled to maintain an action for the possession of a deposit left with a third person on the agreement to purchase by the second vendee when an agreement to sell to the first vendee was still in force, *Norris v. Hay*, 149 Cal. 695, 87 Pac. 380. To secure the payment of an installment of the purchase price of property to be conveyed by the plaintiff to the defendant, the latter deeded to the former land in another state. In an action for a foreclosure of the contract it was held that defendant should pay the debt within a time fixed or convey to plaintiff the land given as security, *Dickson v. Loehr*, 126 Wis. 641, 106 N. W. 793. Plaintiffs conveyed their homestead to their son and his wife, defendants, in consideration of their promise to support them for the rest of their lives. In an action to set aside the conveyance, where it appeared that the inability of the parties to observe the terms of the contract was due to the fault of the

plaintiffs it was held that the plaintiffs could not complain of a decree giving them cash in lieu of the services, *Wanner v. Wanner*, (Wis. 1907) 113 N. W. 1096. The fact that a buyer's bill to specifically perform a contract for the sale of land upon which he had made a payment was dismissed because the seller could not perform does not prevent the buyer from rescinding the contract and suing at law to recover the money paid, *Logan v. Flattau*, (N. J. 1907) 67 Atl. 1007. A buyer's petition which alleges that he had paid the purchase price and is in possession but that there is a paramount outstanding title, does not disclose a cause of action and is premature as to the demand for restitution of the price, because it contains no allegation of an eviction by judicial proceeding or the pendency of a suit therefor, *Bonvillian v. Bodenheimer*, 117 La. 793, 42 S. 273. When the deceased had made a contract with a real estate company to sell land and develop it, under which they went to great expense preparing the property for sale, the contract became void on the death of the testator, as it contained a clause requiring the testator's approval of the prices for which the land sold. The real estate company was entitled, however, to reimbursement for the expense it had undergone from the proceeds of the subsequent sale of the property, *Fisher v. Southern L. & T. Co.*, 138 N. C. 90, 50 S. E. 592. In an option contract for the sale of a large tract of land, good for 90 days, the owner agreed to deliver, within 60 days, complete abstracts of title of the land. Held, the covenant to furnish abstracts was a material part of the contract and defendant's failure to observe it entitled plaintiff to rescind the contract and recover the deposit on account of the purchase price, *Reynolds v. Lynch*, 98 Minn. 58, 107 N. W. 145.

Deposit. An agreement for the sale of land provided that the grantors should deliver an abstract of the title and that the grantees should have five days to examine the title, and if there were any flaws discovered in the title the grantors should have thirty days within which to remedy them. As the abstract was delivered, and there was no objection to the title for 30 days the deposit was forfeited under the terms of the agreement, although an objection was later made to the title, *Kane v. Jones*, (Wash. 1907) 91 Pac. 2. The plaintiff agreed to purchase certain lots paying \$750 down but the contract was mutually rescinded and the plaintiff was given credit for the \$750 on the purchase of another piece of property, and

when the agreements for the purchase of this property were rescinded a bond was given for a house and lot and the plaintiff retained the bond after a few changes had been made in respect to price, etc., and the bond gave the plaintiff credit for the \$750 paid. When the evidence showed that the defendant was able to perform his contract to sell the house and lot the plaintiff was not entitled to have his money returned, *McLean v. Wedell*, 31 Utah 468, 88 Pac. 414. A contract provided that A should purchase of B and C eight thousand acres of land and A repudiated the contract after having paid for part of the land, but such renunciation did not excuse B and C from showing an ability to perform the contract but when the land department refused to ratify their selections so it was impossible to complete the contract B and C were not entitled to the deposit money which A had deposited as security for the performance of the agreement, *Wells Fargo & Co. v. Page*, 48 Ore. 74, 82 Pac. 856. A contract for the sale of real estate made time of the essence of the contract and provided that the deposit should be forfeited if a second payment and a mortgage were not tendered by a specified time. The owner extended the time once, and the money and mortgage were tendered and refused before the time expired, but the tender was not valid when the power of attorney to make the mortgage had not been received by the purchaser's agent, although it had been executed and mailed to him, and the deposit was forfeited, *Sleeper v. Bragdon*, (Wash. 1907) 88 Pac. 1036.

Sec. 605. Forfeiture or rescission—Waiver.

Rescission for misrepresentations, see *ante*, §598.

Forfeiture of option, see *post*, §606.

An agreement for the sale of land which provides that the title shall be made satisfactory to the buyer within a certain time may be rescinded if this is not done, *Meyers v. Catawissa Coal Co.*, (Penn. 1907) 67 Atl. 904. In Louisiana an action for resolution (rescission) of a sale of land for non-payment of the price lies only where restitution in integrum can be made. When a married man sells community property during his marriage and his children, after his death, seek to dissolve the sale for non-payment of the price, his widow in community is a necessary party. If she is already estopped, the children are, *Bankston v. Owl Bayou Cypress Co.*, 117 La. 1053, 42 S. 500. Where a title bond provided that the seller

could cancel the agreement for a sale upon the failure of the buyer to pay the installments promptly as due, the mere refusal to accept an overdue installment does not constitute a cancellation. A more formal method must be pursued and the purchase money already paid returned, *Crawford v. Meyrovitz*, (Ala. 1907) 43 S. 789.

Code Sec. 4297 and 4299, relative to forfeiture of contracts for sale of land, construed, *Clifton Land Co. v. Davenport*, 130 Ia. 94, 106 N. W. 365. Agreements for the sale of land are made void unless suit is begun within the time required by N. J. Laws 1907, Ch. 200. A contract executed in Minnesota for the sale of estate in Colorado with a clause providing for forfeiture on default by the purchaser is subject to the Minnesota laws (1907 c. 223) requiring notice of cancellation of such contract, *Finnes v. Selover, Bates & Co.*, (Minn. 1907) 113 N. W. 883. A and B contracted with C to purchase a ranch under an agreement making time of the essence of the contract and providing that if any of the payments were not made as agreed that the previous sums paid should be forfeited but when A failed to pay his share of a payment B was under no obligations to make his payment, but he had a right to enter into a new contract with C for himself alone in regard to the whole land. It was not necessary for C to notify A that he would enforce a default as all of A's rights lapsed under the agreement when he failed to pay the installment of the purchase price, *Commercial Bank v. Weldon*, 148 Cal. 601, 84 Pac. 171.

Waiver. Although a contract made time of the essence of the contract, a forfeiture will not be decreed when the owner did not declare the forfeiture but on the contrary allowed the plaintiff a short time to raise money to complete the terms of the contract and did not expressly declare a forfeiture promptly and tender back the notes, *Cue v. Johnson*, 73 Kan. 558, 85 Pac. 508. Where evidence shows that the owner of land was entitled to disaffirm a contract for the sale of it at his option because his agent arranged with the purchaser for a share in the purchase but that he elected to affirm it by accepting part payment he cannot then defend against its enforcement, *Bennett v. Glaspell*, (N. D. 1906) 107 N. W. 45.

Sec. 606. Options. Where A obtains an option on a hotel from B made out to himself, but ostensibly for the bene-

fit of C for whom he was acting as agent, C has a prior right to the option over D to whom A assigned it, especially when B said she would not sell to anyone except C, *Henry v. Black*, 213 Pa. 620, 63 Atl. 250. When A bought a mining lease and option at a sheriff's sale and B subsequently held an execution sale of the same property and bought it in, assigning the title to the purchaser of the first sheriff's deed to give A security for his judgment, B was entitled to redeem the property for the amount due, especially when B subsequently obtained a new offer of sale or option from the owners and purchased the property under the new option, *Franklin v. Burris*, 35 Colo. 512, 84 Pac. 809.

What constitutes. A contract of sale embodied in a writing in the form of a receipt and agreement providing for the return of a deposit in case of defective title and for the forfeiture of the payment on account in case the purchaser should refuse to take the property is simply an option, *Smith v. Merrill*, (Wis. 1908) 114 N. W. 508. A letter by the owners of land to third parties, reading as follows: "We will withdraw (certain land) from the market until January 1, 1904, during which time you may send your men to look it over, and if—you desire to take this land, we will sell—at the rate of \$20 per acre", did not constitute an option but a mere offer to sell, *Comstock Bros. v. North*, 88 Miss. 754, 41 S. 374.

By co-owner. A contract for the sale of land provides that the optionee shall have an option to buy a half interest in the land at \$4.00 per acre, and it is construed as granting the optionee the privilege of paying \$4.00 and not \$2.00 per acre, although there is only one half acre in each acre which the optionee could own if a partition were made. This is especially true when the owner would be compelled to sell at the price he paid for the land losing interest and profit if the agreement were construed as meaning \$2.00 per acre, *Stein v. Archibald*, (Cal. 1907) 90 Pac. 536.

Profits under. The plaintiff and the defendant obtained an option to purchase land owning each a half interest in the option, and the defendant received a very large offer for the land which he concealed from the plaintiff and induced him to sell for a very low price. The plaintiff was however, entitled to a full half of the profit, *Lazier v. Cady*, 44 Wash. 339, 87 Pac. 344. An optionee contracted to sell his options on coal lands for the difference in price between \$40 per acre and

the price at which he had obtained the options from the farmers. Then the purchaser notified him of his intention to take the option, but he failed to pay the farmers and purchase the lands. He was then liable for the profit which the original optionee would have made if the transaction had been completed, *Strasser v. Steck* (Pa. 1907) 66 Atl. 87.

Liabilities. Where an option describing land recited \$1 consideration as paid, and made the grantors liable to convey the coal thereunder within a specified time upon notice of acceptance of the option and the payment of \$5 per acre, the \$1 was the consideration for extension of the offer of sale and the price per acre the consideration for the coal. \$1 was insufficient consideration but upon acceptance the options could not be withdrawn, *Thompson & Co. v. Reid*, 31 Ky. Law. Rep. 176, 101 S. W. 964. An option provided for a first payment of \$500, but when it was extended, reciting "that the party of the second part hereby agrees to pay the \$500 on or before May 4th 1903" he has bound himself definitely to make that payment and an abandonment of the option does not release him from liability, *Williams v. Brooks*, 11 Idaho 539, 83 Pac. 610.

Extension. An option required acceptance within a given time, but when the optionor by a written agreement extends the time so as to give time to make a survey and obtain an abstract of the title, the option remains in force. An option made out to A or his assigns is enforceable by the assigns, *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830.

Where the last day of an option to real estate fell on Sunday, the optionee was allowed to make the tender on Monday and a notice to the bank revoking the option was not sufficient to charge the grantee with notice, *Smith v. Russell*, 20 Colo. A. 554, 80 Pac. 474.

Forfeiture of rights. If a party surrenders an equity of redemption from a mortgage for an option to purchase the property at a given price, the option to purchase must be strictly complied with or all rights will be lost, *Jeffreys v. Charlton*, (N. J. Ch. 1907) 65 Atl. 711. When a contract gave a tenant an option to purchase upon the prompt payment of five rent notes and stated expressly that time was of the essence equity was powerless to prevent a forfeiture, and the tenant by failing to pay the last note promptly lost his option, *Carpenter v. Thornburn*, 76 Ark. 578, 89 S. W. 1047. Where

a party obtains an option on a mining claim under which he promises to pay \$1,500 by a certain date or forfeit the \$500 deposited, and time is made of the essence of the contract, the fact that the optionor did not hold the title to the property but only had an option to buy it, did not invalidate his right to claim a forfeit of the \$500 as liquidated damages, *Donovan v. Hanauer*, (Utah 1907) 90 Pac. 569. An option allowed the defendant the right to purchase a mining claim if he commenced work within thirty days and made certain payments as specified, but a tender of a deed was not necessary to enable the owner to regain possession of the property as it was a unilateral contract, so he had a right to bring an action for possession when the defendant's agent refused to deliver up the mine to him after a breach of the conditions of the agreement, *Bruschi v. Quail, M. & M. Co.*, 147 Cal. 120, 81 Pac. 404. The optionees of a mine assigned a part interest in it to A and B for the consideration of the payment of the purchase price by installments. A failed to pay his proportion of the second installment, but made an agreement so that the joint note of the optionees and the assignees was accepted by one of the vendors who raised money on it at a bank. Then A was unable to pay his share of the note but that was not a ground for forfeiting his interest and he had a right to a conveyance of his share in the mine when he offered to pay the amount due, *Larsh v. Boyle*, 36 Colo. 18, 86 Pac. 1000. When the mortgagor deeds the property to the mortgagee with an option to reconvey within two years, he has no right to compel reconveyance after the two years has passed, and when he has allowed the mortgagee to sell a tract of timber land within the two years without objecting for five years, although he knew of the sale, he is estopped by his own laches, *Nelson v. Smith*, (Wash. 1907), 92 Pac. 131.

A contract between the owner and another which recited the receipt of a certain sum as earnest and part payment for certain land and provided that a warranty deed shall be given when the title has been examined and the whole transaction completed within a certain number of days amounted only to an option. If the title proved bad the earnest money must be returned. And as time was of the essence all rights to exercise the option expired upon the expiration of the date mentioned, *Ind. & Ark. Lumber & Mfg. Co. v. Pharr*, (Ark. 1907), 102 S. W. 686.

Sec. 607. Vendor's lien—Existence—Loss. The assignee of a vendor was held to acquire a lien on vendor's interest in property to be sold by executory contract, not exceeding the amount unpaid on the contract, *Lamm v. Armstrong*, 95 Minn. 434, 104 N. W. 304. The vendor of land, who agrees to erect a house thereon, and gives a deed before the house is finished, has a lien on both, *Shaw v. Tabor*, 146 Mich. 544, 109 N. W. 1046. One having a vendor's lien on land for the purchase price is not bound to inquire of subsequent purchasers whether they know of his rights, *Gillbough v. Runge*, (Tex. 1906) 91 S. W. 566. Where the plaintiff could not prove that there was any real money consideration paid for the execution of a deed, he was not entitled to a vendor's lien on the land for the amount of consideration named in the deed after it had been lost, *Shugars v. Shugars*, (Md. 1907) 66 Atl. 273.

On timber. When the purchaser of land with timber on it pays down a cash deposit and agrees to make monthly payments, and then proceeds to cut the timber and manufacture it, the owner is entitled to a lien on the manufactured timber remaining on the premises, when the purchaser fails to pay his monthly payments, although the vendor has a defect in his title, *Spies v. Butts*, 59 W. Va. 385, 53 S. E. 897.

Existence. As against the assignee of vendee the vendor is entitled to a lien for a deficiency in the value of goods exchanged for the land in spite of Code Sec. 2924, *Hodgson v. Smith Bros.*, (Ia. 1907) 114 N. W. 39. Where part of the purchase price was the assumption of certain mortgages and the seller when he executed the deed paid part of one of them to secure the release of a collateral mortgage upon other land which secured the mortgage in question, he was entitled to a vendor's lien for the sum so paid, *Bach v. Kidansky*, 186 N. Y. 368, 78 N. E. 1088. Where part of the consideration mentioned in a deed was the grantee's covenant to build a house upon the land conveyed, the grantor in a suit for specific performance was entitled to a vendor's lien thereon and to a decree that if the grantee failed to build the house within a time set by the court he should recover from him its value as damages, *Hagins v. Sewell*, (Ky. 1907) 99 S. W. 673. When a deed recites \$5,000 as the cash consideration paid and a further sum of \$2500. to be paid out of the profits of a stone plant to be built on the premises by the grantee, upon the failure of the latter to build the stone plant the grantor has a vendor's

lien on the land, *Burroughs v. Gilliland*, (Miss. 1907) 43 S. 301. Where the plaintiff conveyed a right of way to the defendant railroad upon the oral promise by one of the defendant's agents that the latter would pay him \$25 per acre for amount, although the consideration stated in the deed was it the plaintiff is entitled to a vendor's lien thereon for that one dollar, *Matthews v. Delta S. Ry. Co.* (Miss. 1907) 43 S. 475. Where a defendant agreed to sell three tracts to the plaintiff but the deed only conveyed two and the defendant the third, rescission was granted and the plaintiff was given a lien for the amount of the purchase price he had paid. The latter was chargeable, however, with the value of the rents while he held possession but a writ of possession would not issue to the defendant until the plaintiff had had a reasonable opportunity to remove the growing crops, *Gayle v. Troutman*, 31 Ky. Law Rep. 718, 103 S. W. 342. Where a seller conveyed to the buyer and made a third person beneficiary for life of the interest on the purchase money note and upon the purchaser's default in payment thereof, the premises were sold to the seller's attorney, who for a recited consideration and the surrender of a note held by the seller and made by a subsequent buyer from him received a deed from such subsequent buyer, it was held that as the attorney had no authority from his client to surrender the note the right of the beneficiary for life on her note was not affected by the transaction. As the latter note constituted a lien on the premises they could be sold to satisfy it although in the hands of a remote grantee, *Malone's Committee v. Lebus*, (Ky. 1906) 96 S. W. 519.

When J without authority bought land and took the deed in the name of R, giving his own note for the purchase price, and the only delivery was to J which was not ratified by R, there can be no vendor's lien as the legal title never vested in the grantee, *Jones v. Laird*, (Ala. 1904) 42 S. 26. Where the owner of land agreed to exchange it for apartment houses and the owner of the latter agreed in addition to pay the rent of vacant flats at designated prices for one year, as the amount was unliquidated the owner of the land was not entitled to a vendor's lien for claims arising out of the transaction, *Ross v. Clark*, 225 Ill. 326, 80 N. E. 275.

Loss—Release. As a purchase money note is not essential to the existence of a vendor's lien an alteration in the note as to description of the land is immaterial even if after delivery,

Nance v. Gray, 143 Ala. 234, 38 S. 916. When a vendor is induced by a purchaser to take as a part of the purchase price a worthless note and mortgage, he may tender and return the note and mortgage and retain a vendor's lien on the land for the amount represented by the mortgage, Rhodes v. Arthur, (Okl. 1907), 92 Pac. 244. Where a seller of land took a note signed by a third party as surety for part of the price which recited that it was given in part payment of the land described by the government subdivisions, the vendor's lien was not thereby waived, Spears v. Taylor, (Ala. 1907) 42 S. 1016. The vendor's lien is not waived by the taking of notes signed by the father of one of the grantees for a portion of the purchase price, the balance to be regarded as an advancement to the grantees, Acree v. Stone, 142 Ala. 156, 37 So. 934. The manner of releasing a vendor's lien is prescribed by Md. Laws 1906 Ch. 65.

Sec. 608. Vendor's lien—Action to enforce. A vendor who retains a lien may sue to restrain waste. The ten year statute of limitations does not apply to such a suit and all sub-purchasers of parts of the land are proper parties to a bill to enforce the lien, Reynolds v. Lawrence, 147 Ala. 216, 40 S. 576. In an action to enforce a vendor's lien the defence of failure of title is not sustained where vendor can show unbroken possession, for seven years, of part of the tract, under a void tax deed of the whole tract, Bradbury v. Dumond, 80 Ark. 82, 96 S. W. 390. As to what constitutes a "demand" for possession of land contemplated by Alabama Code 1896, section 3506, as to redemption of lands sold to foreclose a vendor's lien, see Henderson v. Hamrick, (Ala. 1905) 39 S. 918. The assignee of purchase-money notes is entitled to have the lands sold to enforce the vendor's lien. And where it is in effect admitted by the defendants that a deed had been executed he need not produce the deed, Elmslie v. Thurman, 87 Miss. 537, 40 S. 67. Under Code of 1899, Sec. 1a, C. 132 a decree for the sale of real estate of more than \$500 in value must be advertised by the person appointed to make the sale in two counties if the timberland extends into both counties, Gauley Coal Land Ass'n v. Spies, 61 W. Va. 19, 55 S. E. 903.

Sec. 609. Bona fide purchasers—Who are. Definition of bona fide purchaser of meandered lake beds, Ia. Laws 1907,

Ch. 197. Although a purchaser does not exercise due care in looking up a title or examine the county records, yet he may claim to be a bona fide purchaser for value if the records do not disclose anything against the title, *Martin v. Ragsdale*, 67 S. C. 71, 50 S. E. 671. If a party holds the junior legal title to land he must claim and show that he is a bona fide purchaser and that he was not charged with notice of the senior title, *Austin v. Union Paving & C. Co.*, (Cal. 1906) 88 Pac. 731.

As against judgment creditors of a vendee in possession of land at the time a mortgage is given a mortgagee who has no knowledge of the vendee's rights is a bona fide purchaser, *Gray v. O. W. Kerr Land Co.*, (N. D. 1907) 113 N. W. 1034. When a grantor retains possession of land, it is not notice of a mistake in a deed to an innocent purchaser from the grantee, *Malette v. Wright*, 120 Ga. 735, 48 S. E. 229. A decree of the court ordered the sale of a property investing A with the absolute ownership, and when B purchased under that decree he was a bona fide purchaser without notice of a defect in the title, and his title was valid, although the decree was subsequently reversed, *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913.

The purchaser of a bare equity is not a purchaser for value without notice, *Deskins v. Big Sandy Co.*, (Ky. 1905) 89 S. W. 695. When the plaintiffs brought an action against E, the common source of title, in which the validity of his deed to his wife was challenged and prior to its dismissal brought an action of ejectment a buyer during the pendency of the first suit was not entitled to the rights of a purchaser for value without notice, *Scharff v. McGaugh*, 205 Mo. 344, 103 S. W. 550.

Where a wife who has bought land from a husband who is a trustee, and received the title, repudiates her executory contract to pay the purchase price upon the ground that contracts between husband and wife are void, she ceases to be a purchaser for value, holds the land subject to the trust and the husband can compel a reconveyance to him as trustee, *Atkins v. Atkins*, 195 Mass. 124, 80 N. E. 806.

When a deed by mistake failed to correctly describe a certain 40 acre lot but the purchaser went into actual possession of a portion of it a subsequent purchaser from the original owner was not a purchaser for value without notice, but held

subject to the equity of reformation, *Thalheimer v. Lockhart*, 76 Ark. 25, 89 S. W. 591.

Sec. 610. Bona fide purchasers—Rights of. A bona fide purchaser for value from a fraudulent grantee will be protected, *McKee v. West*, 141 Ala. 531, 37 So. 740. A bona fide purchaser by an unrecorded deed will be protected against an execution creditor who buys at the execution sale if the latter has notice of the older equity before the sale, *Moore v. Faris*, (Ky. 1906) 92 S. W. 592. Under Laws of 1885, p. 233, c. 147, a bona fide purchaser for a valuable consideration from a trustee holding under a deed of trust from A the legal owner, has a title valid against the purchaser from A whose deed was lost and was unrecorded, *Hinton v. Moore*, 139 N. C. 44, 51 S. E. 787. If a party to a suit for the sale of a debtor's land buys the land at the sale and then conveys the property after the sale is confirmed, to a bona fide purchaser for a valuable consideration without notice of a defect in the sale, the rights of the purchaser are unaffected by a subsequent decree reversing the order of sale, *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

Because in the light of subsequent occurrences a sale has proven injudicious and unfortunate for the interests of the heirs under disability, who through the misconduct of the trustee of the estate have been stripped of a valuable inheritance, there is no pretense for interfering with the title of an innocent purchaser, *Rhea v. Shields*, 103 Va. 305, 49 S. E. 70.

A person who has repaid an original loan tainted with usury in full is entitled to have a trust deed securing it cancelled even against an innocent holder of the notes and security, *Armor v. Bank of London*, (Fla. 1905) 39 S. 17.

A chattel mortgage on buildings, given as security for the lumber, does not have precedence over a subsequent conveyance of the real estate to a bona fide purchaser, *Bazelman Lumber Co. v. Hinton*, (Neb. 1907) 112 N. W. 603. If a bona fide purchaser of real estate who held a second mortgage on the property accepts a quit claim deed from the owners of record after assurance from the notary who took the acknowledgment and the witness to the signature of the deeds from the grantor of the owners of record that the transaction was bona fide, he was entitled to retain the property although the grantor

of the owners of record subsequently claimed the deeds were obtained by fraud, *Fountain v. Kenney*, 71 Kan. 642, 81 Pac. 179. Innocent purchasers of land for value are protected to the extent they paid the purchase money before notice of an equity held by a third person, but for so much paid after notice must account to such person, *Sparks v. Taylor*, (Tex. 1906) 90 S. W. 485. Where a mother makes a voluntary conveyance of land to her children, and later for a valuable consideration, conveys the same land to another who has been informed of the voluntary conveyance, and the grantee of the later deed conveys to another who has had no notice, the title of the last grantee will hold, *West v. Wright*, 121 Ga. 470, 49 S. E. 285.

Embezzlement. Where the plaintiff was an infant and his guardian invested the plaintiff's funds in a mortgage on his own land and subsequently released it as guardian on the records without returning the money or obtaining the authority of the court and then procured another mortgage on the property, it was mere embezzlement and subsequent purchasers for value without notice obtained titles free from the lien of the mortgage to the plaintiff, *Cummings v. Strobbridge L. S.*, 150 Cal. 209, 88 Pac. 901.

WASTE

Sec. 611. What constitutes—Pleading and practice.

A lessee of Mississippi School lands under a lease for 99 years made in accordance with the act of 1833 is liable for waste. The cutting of timber for commercial purposes is waste. The ancient English Common law, and in this connection the English Statutes of Marlbridge and Gloucester, are exhaustively discussed, (Calhoun J. dissenting), *Moss Point Lumber Co. v. Harrison County*, 89 Miss. 448, 42 S. 290. When the residue was devised to two grandchildren, "share and share alike;" but should either—"die without an heir of his or her body living or in being at the time of the death of such grandchild,—the share of such deceased grandchild shall go to my son" with a similar provision if both grandchildren so died, the grandchildren took as tenants in common, a base or determinable fee, subject to an executory devise. Equity will enjoin

equitable waste by the owner of such a determinable fee only when the contingency which is to determine the estate is reasonably certain to happen and the waste is of a character to charge the owner with a wanton and unconscientious abuse of his rights. The case contains a valuable list of authorities, *Fifer v. Allen*, 228 Ill. 507, 81 N. E. 1105. When a receiver removed 2 freight elevators, a steam engine, pumps, etc., from a factory and sold them, he was liable for waste to the mortgagee if the premises did not bring the amount of the mortgage as the articles removed and sold were fixtures necessary to the carrying on of the business of the company, and they gave an increased value to the mortgaged factory. The measure of damages caused by the sale of the fixtures was the difference in the price which the factory would have brought if the fixtures had been installed and the price which the factory actually brought at the sale without the fixtures, and it was not the price the receiver obtained for them when he sold them previous to the mortgage sale, *Prudential Ins. Co. v. Guild*, (N. J. Eq. 1906) 64 Atl. 694.

Pleading and practice. Montana Code Civ. Proc. §690, sec. 691, 699 and 701 in reference to pleading in an action for waste were construed, *Erbes v. Smith*, (Mont. 1907) 88 Pac. 568. Heirs at law brought a petition against a dowress, alleging waste in permitting improvements to become out of repair as well as in the cutting of timber, and prayed for forfeiture or for damages in case the evidence did not establish forfeiture. There was no special demurrer. Held, that the judge should have submitted both issues to the jury without a written request asking the submission of the question of damages, *Roby v. Newton*, 121 Ga. 679, 49 S. E. 694.

WATERS

Rights of abutters against flooding from street, see *ante*, §222.

Drainage of or across railroad right of way, see *ante* §484.

As to rights of riparian owners to divert waters, see IRRIGATION.

Waters as boundaries, see *ante*, §29.

Right in spring, see *ante*, §104.

Sec. 612. Accretion and avulsion—Change in bed of stream.

See further, title to submerged land on subsidence of waters, *post*, §615. When there was a change in the channel of the Missouri River and land was formed by gradual accretion, it belonged to the owner of the shore and the separation of such land from the shore at high water was not sufficient to make it an island, when it was connected with the shore at low water, *McBrude v. Steinweden*, 72 Kan. 508, 83 Pac. 822. In apportioning the accretion on the shore of a lake it is proper to include a municipal tunnel for taking in water as part of the shore line, where it forms the actual line between the water and the alluvial deposit, *Hathaway v. City of Milwaukee*, (Wis. 1907) 111 N. W. 570. The evidence was examined and showed that certain land on a stream was added by accretion rather than avulsion and belonged, therefore, to the owner of the tract to which it was attached when suit was brought, *Bouldin v. Kosminsky*, (Ark. 1907) 100 S. W. 892.

Accretion. The water's edge, not the U. S. government survey meander line, is the shore line from which lines must be drawn to determine the water and accretion rights of adjoining riparian owners. The case contains a valuable discussion of authorities, *Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N. E. 296. When a deed as reformed by equity had the Arkansas River as a boundary the grantee took accretions and his line shifted with the river, *Perry v. Sadler*, 76 Ark. 43, 88 S. W. 832. A deed conveying all that portion of certain lots that lie west of a certain line, containing 3.03 acres, where the western boundary of the lots is a lake of varying size conveys all the land which has become a part of the lots by the recession of the lake, *Sherwin v. Bitzer*, 97 Minn. 252, 106 N. W. 1046.

The question of whether or not land has formed in a river by accretion is not a subject for expert testimony alone, but for all men of ordinary information, *Mallorey v. Brademyer*, 76 Ark. 538, 89 S. W. 551. Evidence examined in an action in ejectment to determine the title to certain accretions and held to warrant a finding in favor of the plaintiff. When the deposit began against the shore of the mainland, the subsequent existence of an intermediate stream of water between the accretions and the mainland does not necessarily exclude the ownership thereof by the owner of the upland, *Dowdle v. Wheeler*, 76 Ark. 529, 89 S. W. 1002. As to the rights of riparian owners on the Mississippi River in Louisiana to bat-ture accretions, see *Minor's Heirs v. New Orleans*, 115 La. 301, 38 S. 999.

In a great freshet which was blocked by an ice gorge, turning the Missouri River on to the plaintiff's land, big trees were torn up and masses of earth gouged out until the river had made a new channel for itself, cutting off a part of the farm which it left as an island in midstream. The ownership of the island still remained with the plaintiff, and when the intervening land subsequently reappeared by alluvial accretion, the former owner had a right to its possession, *Fowler v. Wood*, 73 Kan. 511, 85 Pac. 763.

Loss of land acquired by accretion. Where the Missouri River at one time ran with a current on both sides of an island but later forsook the southern side leaving there only a slough which in the course of time disappeared, it was held that as the slough while it existed constituted the northern boundary of a tract of land and after its disappearance certain land in dispute was added thereto by gradual deposits or relictions, the fact that at a later period a new slough suddenly cut its way through at a season of high water did not affect the title acquired by accretion, *Stoner v. Royar*, 200 Mo. 444, 98 S. W. 601.

Accretions made to islands accrue to the owner of the island, *Hilleary v. Wilson*, (Ky. 1907) 100 S. W. 1190. If the land on an island is imperceptibly enlarged by natural accretions, the holder of a title from the state owns the enlarged island and can dump material on the accretions to hasten their formation into solid ground, and such deposits can also be made on marsh land which is above low water

mark, *Houseman v. International Navigation Co.*, 214 Pa. 552, 64 Atl. 379.

Sec. 613. Title of riparian owners to submerged lands
—**By State grant.** The exclusive right to remove sand from the bed of the Mississippi River is vested in the riparian owners by Ark. Acts of 1907, No. 348. The proceedings to determine the ownership of riparian land in which the state claims an estate are prescribed by N. J. Laws 1907, Ch. 48. Buffalo City Charter (N. Y. Laws 1891, p. 225, c. 105, section 417) authorizing the taking of land for corporate purposes construed. When the city sought to condemn lands under the waters of a river, the owner in fee not being a riparian owner and the evidence as to value conflicting and speculative the commissioners were authorized to give only nominal damages, *City of Buffalo In Re*, 189 N. Y. 163, 81 N. E. 954.

Grant by state. When a deed made by the riparian commissioners to a riparian owner granted land under water with the right to exclude the water therefrom, the owner or her grantee may bring an action for ejectment against anyone building a pier on the land granted by the deed, *Burkhard v. H. L. Heinz Co.*, 71 N. J. Law 562, 60 Atl. 191. By the Act of March 27, 1874 (Revision, p. 986) the riparian commissioners may grant lands under the tidal rivers of the state, and six months notice is necessary to the other riparian owners giving them an opportunity to purchase the lands at the price fixed by the commissioners. When such notice is not given the grant may be vacated at the instance of one of the riparian owners, *Shamberg v. Board of Riparian Com'rs*, 72 N. J. Law 132, 60 Atl. 43. Under a crown grant of land under water to a town, the latter holds in trust for the members of the community, the common law principle that the king owned the soil of the sea in his own right not being applicable. But the owner of a piece of upland by a title devised under another crown grant may build thereon a pier upon piles which extend about 150 feet into and over the waters of the bay. The case contains a valuable discussion of the difference between the English and New York common law on the subject, (3 Judges dissenting) *Trustees, etc., of Brookhaven v. Smith*, 188 N. Y. 74, 80 N. E. 665.

Sec. 614. Rights in flats or reclaimed land—Line of ownership of upland.

See further as to flats, § 465.

Flats—Boundaries. As to the rights given the West Beach Corporation to a certain beach at Beverly Farms under Mass. St. 1852, p. 110, c. 157, a special act incorporating the residents of a certain territory, see *Preston v. Wests Beach Corporation*, 195 Mass. 482, 81 N. E. 253. A boundary of land was described as "Beginning in the N. E. corner of A's land," thence running by various courses around "the western side of the cove to the first mentioned bounds," but it did not include the flats, *Whitmore v. Brown*, 100 Me. 410, 61 Atl. 985. Where the description in a deed was as follows, "beginning at a point on the shore" thence by metes and bounds "to the shore," thence "along the shore—to the point of beginning, and—bounded westerly by Squam river," the flats passed. The case contains a valuable discussion of authorities, *Haskell v. Friend*, 196 Mass. 198, 81 N. E. 962.

Flats—Title. In Louisiana batture property or land on the bed of a river which is covered at high water is under the control and administration of the municipality and cannot be granted in fee simple. A right of way, therefore, granted thereon is subject to regulation to protect the public, *Shreveport v. S. & Louis S. W. Ry. Co.*, 115 La. 885 40 S. 298. Land on Manhattan Island between high and low water belongs to the City of New York under an ancient charter, *Re Mayor of City of New York*, 182 N. Y. 361, 75 N. E. 156. A public way cannot be laid out over flats without legislative authority. The owner has an estate in fee, subject to the public rights of fishing, fowling, and passing over them in boats, and may maintain trespass quare clausum for any injury done to his lawful possession of said flats. Petitioners for the location of a bridge over such flats are not thereby estopped from denying the legality of the latter location, *Chase v. Cochran*, 102 Me. 431, 67 Atl. 320. When the damages to land are ascertained by condemnation proceedings and the award of viewers, only the land down to low water mark belonging to the plaintiff may be considered in apportioning the damages, and the plaintiff has no interest between the low water line and the harbor line, beyond which by act of Congress no piers, bulkheads, or other works shall be constructed, as the title is in the Commonwealth, and the plaintiff is not entitled to dam-

ages for the taking of land by a railroad which lies beyond the low water line, *McGunnegle v. Pittsburg & L. E. R. Co.*, 213 Pa. 383, 62 Atl. 988.

Reclaimed land. At common law the owner of land upon tide water who reclaimed any part of the shore adjoining gained title thereto, *Heiney v. Nolan*, (N. J. 1907), 67 Atl. 1008. The plaintiffs had acquired title to certain land by adverse possession and had reclaimed it, but they only owned as much as they actually occupied and they could not maintain a bill to prevent the reclamation of other land outside of the land which they held, *Moran v. Denison*, (Conn. 1906) 65 Atl. 291.

Line of upland. In a grant of land bordering on navigable waters made prior to the adoption of the constitution of the State of Washington, where the meander line of navigable waters run by the government is below the line of ordinary high water the former line marks the boundary of the grant. The owner of such land may enjoin the use by another not only of the strip between such lines, but of the shore lands lying between the meander line and the line of ordinary low water mark; but where he has not purchased such shore lands from the government he has no riparian or littoral rights in the navigable waters and can not enjoin an obstruction placed upon them, *Van Sicken v. Muir*, (Wash. 1907) 89 Pac. 188. In ejectment where the location of low water mark on the east side of a creek is in dispute it cannot be assumed to be not west of the center line of the creek because one bank may have been sheer and the other shoal nearly the whole width of the creek, *Heiney v. Nolan*, (N. J. 1907) 67 Atl. 1008.

Sec. 615. Title to submerged land upon subsidence of water. Leases of abandoned river channels are authorized by Ia. Laws 1906, Ch. 212 Sec. 7. The common law is applicable to the rights of riparian owners to the abandoned channel of a navigable stream in Nebraska, and where the river forms the boundary between estates, the title to the bed, as far as the thread of the stream, is in the riparian owner. *Kinkead v. Turgeon*, (Neb. 1906) 109 N. W. 744. When a river recedes the new shore line is to be apportioned among the owners of premises abutting on the old shore line so that each shall have the same proportion of the new line as he had

of the old. Each is entitled to the accretions formed in front of his property, *Berry v. Hoogendoorn*, 133 Ia. 437, 108 N. W. 923. Accretion by recession of waters of a river where the government survey fixes a corner at an inaccessible point then under water, see *Frederitzie v. Boeker*, 193 Mo. 228, 92 S. W. 227.

Owners of land on a non-navigable lake when the water disappears take to the center in proportion to their frontage. A defendant who had been in possession of the dry bed of an old non-navigable lake for seven years knowing that the plaintiff, a riparian owner, was ignorant of his rights cannot claim thereby title by adverse possession or due to the plaintiff's laches, *Rhodes v. Cissell*, (Ark. 1907) 101 S. W. 758.

Sec. 616. Navigable waters—What are—Public rights in and in lands thereunder.

A stream is navigable in fact only where it affords a channel for useful commerce and of practical utility to the public as such. The fact that there is water enough in places for row-boats or small launches, answering practically the same purpose, or that hunters and fishermen pass over the water with boats ordinarily used for that purpose, does not render the waters navigable. It is not necessary that the waters should be navigable in all their parts in order that the public may have a right to navigation, where the waters are deep enough and fit for such use. But the right to navigate does not give the public the additional rights to hunt and fish therein. These latter privileges belong exclusively to the owner of the land covered by the water and he may have a perpetual injunction against persons, forbidding them to hunt or fish therein, *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783. A stream which is not capable of floating logs in the ordinary winter freshets is not navigable, *Kamm v. Norward*, (Ore. 1907) 91 Pac. 448. If a waterway has been used for 35 years as a harbor of refuge and for fishing, it is a navigable stream and the riparian owner cannot obstruct its use, *State v. Twiford*, 136 N. C. 603, 48 S. E. 586. For definition of water course, see N. D. Laws 1907, Ch. 271.

The land under navigable rivers in Nebraska is owned by the state, *Kinthead v. Turgeon*, (Neb. 1905) 104 N. W. 1061. In the absence of proof to the contrary the title to and domain over a tide-water bay is presumed to be in the state, *Cain v.*

Simonson, (Ala. 1905) 39 S. 571. Acts of 1817, c. 71, relating to the condemnation of land for a street and public wharf was construed to give the city, which paid substantial damages to the abutting owners on the street condemned under the provisions of the act, the riparian rights of the landowners in the basin on the harbor side of the street, Mayor, etc., of Baltimore v. B. P. S. Co., (Md. 1906) 65 Atl. 353.

In Massachusetts littoral owners take the fee between high and low water mark subject to the easement of the public for the purposes of navigation and free fishing and fowling, and of passing freely over and through the water without any use of the land underneath, wherever the tide ebbs and flows, Butler v. Atty. General, 195 Mass. 79, 80 N. E. 688.

Sections 3449-3458 Kentucky Statutes 1903 as to the charter powers of cities of the third class, construed, and it was held that the court would take judicial notice that the Tennessee River is navigable and therefore the rights of the public extend to high water mark. As the public right in the river bank between high and low water mark was paramount to that of the owners of the adjacent fee an improvement of a way for the public across their own property cannot be made at the expense of the abutting property owners; that is, the servient owners, Terrell v. Paducah, (Ky. 1906) 92 S. W. 310.

Regulation. The cleaning and repairing of public ditches and water courses are provided for by O. Laws 1906, p. 280. County commissioners are given control over non-navigable water courses by Kan. Laws 1907, Ch. 164 Sec. 1-3.

Right to drain into. A water course may be made a conduit for the discharge of the waters of a public drain at least where the additional flow would not tax the stream beyond its capacity, Hart v. Scott, 168 Ind. 530, 81 N. E. 481.

Sec. 617. Artificial streams. An ancient ditch of artificial construction which, after twenty years or more, is continued without change, with the acquiescence of the public authorities and of everybody interested, should be governed by the same rules of law as would be applied to a natural water course, and if a dam is built across it, so that the flow of water down a river with which it connects is increased to the injury of the riparian proprietors below, the person maintain-

ing the dam is liable to such lower owners, *Stimson v. The Inhabitants of Brookline*, (Mass. 1908) 83 N. E. 893.

Where a dam so raised the waters of a lake as to flood to a depth of about 3 feet an adjoining swamp making it possible for small row boats to use it after the stumps in it were removed and later the complainants under an exclusive grant from the owner of the land under the swamp dredged a channel from the lake itself over the swamp to their own land the public thereby acquired no right to navigate the channel. An injunction issued, therefore, against the operation therein of a passenger power boat, *King v. Muller*, (N. J. Ch. 1907) 67 Atl. 380.

Sec. 618. Right to drain and have water flow on land of lower proprietor—Unnatural flow. A dominant estate has a natural easement over the servient estate for the overflow of streams as well as the flow of surface water and the owner of the servient estate may not build a levee to stop such flow even if good husbandry made it necessary to protect his crop, *Pinkstaff v. Steffy*, 216 Ill. 406, 75 N. E. 163. Where an upper riparian owner on a slough used to drain land, constructed a ditch to increase the flow of the slough and drain some of his other low land, he was entitled to an injunction against the owner of the lower riparian land to prevent his building a dam which would interfere with the drainage of his land, *Cederburg v. Dutra*, 3 Cal. App. 572, 86 Pac. 838. If a lower riparian owner erected a dam which backed up the water so as to interfere with the drainage system of ditches by which the plaintiff drained his land, the defendant was liable for injury to the plaintiff's celery crop by the lack of drainage, *Thomas v. Bolsa L. Co.*, 1 Cal. A335, 82 Pac. 207.

A heavy rainfall caused the waters of a ditch to plough through a field on to a neighboring owner's land, and after the flood ceased there was a steady flow of water in the stream which had well defined banks. When the neighboring owner built a dam so as to turn back the water on the plaintiff's land he could be enjoined as the stream was a natural water course although it spread out beyond his land and its channel became imperceptible. The fact that it came into existence within two or three years did not alter its character, *Rait v. Furrow*, 74 Kan. 101, 85 Pac. 934.

Unnatural flow. An owner or licensee who by digging a cut-off causes water and material to flow upon adjoining lands in increased quantity is liable to the injured owners, *Neumeister v. Goddard*, (Wis. 1907) 113 N. W. 733. A land owner may, by artificial barriers, protect his land from an unnatural flow of water, even though by so doing he obstructs waters which he is ordinarily bound to receive, *O'Connor v. Hogan*, 140 Mich. 613, 104 N. W. 29.

The city had no right to flood the plaintiff's land with more than the natural flow of the stream during flood time on the river by opening the flood gate in its dam, *Osborne v. Norwalk*, 77 Conn. 663, 60 Atl. 645. Under Louisiana Civ. Code Art. 660 which is as follows: "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude," there is no right given the upper owner to extract oil and salt water from the bowels of the earth, and whose natural flow, if any, is a thousand or more feet below the surface, and then allow it to flow into a natural drain over the plaintiff's land below, *McFarlain v. Jennings-Haywood Oil Syndicate*, 118 La. 537, 43 S. 155. In a complaint alleging that the defendant cut and maintained a ditch on and along its right of way leading into a creek and as a result in times of high water the creek overflows on to the plaintiff's land it is not necessary to allege that the ditch was constructed negligently. For an overflow in an ordinary flood the defendant is liable although if the flood be unprecedented that fact would constitute a defense, *Lindsey v. Southern Ry. Co.*, (Ala. 1907) 43 S. 139.

Sec. 619. Right to take water.

See further, *ante* IRRIGATION. The right of a riparian owner to take water from the stream is property, and comes within the protection of article 1, section 17 of the Texas Constitution, *Bigham Bros. v. Port Arthur Canal Co.*, (Tex. 1906) 97 S. W. 686. Where a state statute (*Ballinger's Ann. Codes & St. (Wash.) s. 4114*) provided that the person on whose land seepage or spring waters first arose should have a prior right to them if capable of being used on his land, it was unconstitutional so far as it impaired the common law right of a lower riparian owner to use the water, where his land was patented and the right of his predecessors as owners to

use the water arose before the enactment of the statute, as depriving him of property without due process of law, *Neilson v. Sponer*, (Wash. 1907) 89 Pac. 155. Evidence examined and found to show that the water in a stream in the dry season at a certain point came from the source of the stream and not by seepage from another source, and it therefore entitled a lower land owner to have a dam erected by the upper riparian owner in the dry season removed, *Desmond v. Sanders*, (Wash. 1907) 89 Pac. 179.

Amount. Where the defendant had acquired a right by prescription to 1 inch of water flowing through a pipe from a creek, he was not entitled to any more if it was proved that the rest of the water ran on the plaintiff's land, and a decree was valid which provided that the plaintiff should have the entire flow except one inch for 20 days and that the defendant should have the whole stream one day in 21, *Gutierrez v. Wege*, (Cal. 1907) 91 Pac. 395. When a city has built a dam diverting the water of a stream into the city mains it has no right to permanently diminish the flow of water in the stream by repairs to the dam, and although the repairs might be necessary other riparian owners could not be injured by receiving less water, *Osborne v. Norwalk*, 77 Conn. 663, 60 Atl. 645. When A holds a preferential privilege to the use of the water of a reservoir and B also holds a right to the use of the water, the court shall not draw a line four feet below the top of the dam and allow A the right to close the dam whenever the water was lower than the imaginary line, but each party has a right to his proportional share in the whole body of water, *Berry v. Hutchins*, 73 N. H. 310, 61 Atl. 550.

Rights under unrecorded deeds. When the defendants purchasing a tract of land had no notice of a water right reserved by an unrecorded deed which was subsequently lost, they were not bound by it, especially when the recorded deed of the plaintiff contains no reference to the large water right reserved to it in the unrecorded deed to the defendant's property, *Schmidt v. Olympia Light & Power Co.*, (Wash. 1907) 90 Pac. 212.

Right to take water artificially created. When water has been artificially produced by the petitioner's draining certain mines, he has a right to use all the excess water drained into a stream less the natural flow of the stream and a fair allowance for evaporation of the artificial water from the point where it

was discharged from the head gate where the petitioner has appropriated it, and no one else using water on the stream has a right to interfere with the petitioner, provided he has been the first to appropriate the excess water, *Ripley v. Park Center Land & Water Co.*, (Colo. 1907) 90 Pac. 75.

Protection of rights. If an estate has a right to take water coming through another estate, equity may prevent the interference with the easement, by the construction of tunnels, walls or other means, *Johnson v. Gould*, 60 W. Va. 84, 53 S. E. 798.

Purposes. A person has the legal right to reasonable use for domestic purposes of water flowing in a defined stream across his land, although such stream arises on the land of another person; and such other person has no right to deprive the lower owner of such right, in the absence of prior legal appropriation, by using the water for irrigating purposes in such a way that none of it is returned to the stream, and is unnecessarily wasted, *Nielson v. Sponer*, (Wash. 1907) 89 Pac. 155.

Waiver or other loss of rights. After a town had built a pumping station and connected water mains so that a riparian owner had due notice of the intention of a municipality to divert a creek, and he raised no objection, he was not entitled to an injunction, especially when the evidence was conflicting as to whether any damage to him would result or not, *City of Elberton v. Pearl Cotton Mills*, 123 Ga. 1, 50 S. E. 977. When a mill owner consents to the diversion by a city of the waters of a stream he has no right to damages and as no irreparable injury was threatened thereby he cannot have an injunction against the increase of the diversion, *Beckerle v. Danbury*, (Conn. 1907) 67 Atl. 371. Where upper and lower riparian owners entered into an agreement by the terms of which the upper proprietor could discharge water taken by it from the stream to be used in making steam, into a pond at a level where it could not be used by the lower owner, the latter thereby lost his ordinary rights as riparian owner to the use of the water, although at the end of the agreement there appeared the following clause, "by executing this agreement neither party waives any rights as riparian owners on said stream," *New England Cotton Yarn Co. v. Laurel Lake Mills*, 190 Mass. 48, 76 N. E. 231.

Sec. 620. Rights in lakes, great ponds and islands.

A riparian owner takes only to the high water mark of an inland lake, *State v. Thompson*, 134 Ia. 25, 111 N. W. 328.

Great ponds. Ponds of more than 10 acres in extent are "great ponds" and are under the direct control of the legislature, and when a town has been granted the right to divert water from a "great pond" it is not required to compensate the riparian owners, *American Woolen Co. v. Kennebec Water District*, (Me. 1906) 66 Atl. 316. Under Mass. St. 1895, p. 565, c. 488, the metropolitan water and sewerage board has power to prohibit boating upon Lake Cochituate; a great pond used for water supply, *Sprague v. Minon*, 195 Mass. 581, 81 N. E. 284.

Island in great pond. Under Massachusetts Colonial Ordinances 1641-47 providing that no town shall appropriate to any person any great pond of more than 10 acres the Commonwealth has title to a barren island in a great pond in a town, no part of which island has been granted or conveyed by the town, the colony, the province, or commonwealth, *Attorney General v. Herrick*, 190 Mass. 307, 76 N. E. 1045.

Island. Accretion to island, see *ante*, §612. It was held that the title to an island in the Missouri River that existed before Missouri became a state and was surveyed as government land and patented by the U. S. did not vest in the State of Missouri, *Stoner v. Royer*, 200 Mo. 444, 98 S. W. 601. An island formed in a river, beyond low-water mark, belongs to the county and may be disposed of as swamp land for the benefit of the public schools under Rev. St. 1899, Art. 6, c. 122, *Frank v. Goddin*, 193 Mo. 390, 91 S. W. 1057. Where a deed grants the title to a farm bounded by a river which is not navigable, an island between the farm and the main thread of the stream is also conveyed, *Wall v. Wall*, 142 N. C. 387, 55 S. E. 283.

Sec. 621. Landings, wharves and ferries.

The acquisition, by cities, of riparian lands for docks is permitted by N. J. Laws 1907 Ch. 272. When a municipality has planned a wharf which will interfere with navigation and cause heavy expense to the owners of a line of ferries, it may be enjoined although it has authority under its charter to construct a wharf, *Vellejo Ferry Co. v. City of Vellejo*, 146 Cal. 392, 80 Pac. 514. No person has the right to build a pontoon bridge over a navi-

gable stream without special legislative authority, and a police jury in Louisiana has a right by ordinance to forbid the operation of unlicensed free bridges and ferries within competitive distance of the lessee of a public ferry, *Blanchard v. Abraham*, 115 La. 989, 40 S. 379. A city may maintain a free wharf at the intersection of a public street and a river, although it owns merely an easement in the street, *Williams v. Intendant &c Gainesville*, (Ala. 1907), 43 S. 209.

The City of Providence assumed the right of granting all wharf privileges, and later actually obtained a grant from the State of the submerged land in a cove owned by the State. A lessee of one of the owners of upland did not have any right to erect a storehouse over the land granted to the city, and the city was not estopped because of the levy of taxes on the building or because of a notice filed of the lessee's intention to build, and the city might recover possession by an action of ejectment, *City of Providence v. Comstock*, 27 R. I. 537, 65 Atl. 307. Where the property leased was the right to use a certain part of the plaintiff's dock and flats "for a public float and landing place for boats" and the "right to drive, cap and maintain four oak piles"—and to "build a platform from one side of the pier" and a run—from the platform to the float, the mere removal of the float by the lessee for repairs did not constitute an abandonment of the lease even although it was never brought back. A letter from the mayor of the defendant city, the tenant, tending to show that it was holding over under its lease was prima facie admissible to show such holding over, *Commercial Wharf Corp. v. Boston*, 194 Mass. 460, 80 N. E. 645.

Wharves shutting in riparian owners. When a riparian owner owns land bordering on a cove 1600 feet in length, she has no right to erect a pier to the channel of the river when a pier would injure the other riparian owners in the cove, and therefore she has no right to damages for the loss of such a right when a railroad builds an embankment across the mouth of the cove, leaving only a narrow entrance through which a boat with masts cannot pass, and she is only entitled to damages on account of the injury to her through diminished opportunity of access to the river, and as the cove is very shallow so large vessels could not use it she is only entitled to nominal damages. Two lines drawn at right angles to the channel of the river would embrace the frontage owned by the

plaintiff, *Richards v. New York, N. H. & H. R. Co.*, 77 Conn. 501, 60 Atl. 295. Littoral proprietors on a convex shore, having appurtenant rights of wharfage, may build wharves extending them to lines on either side at right angles to the general contour of the shore. Where there has been a public landing place for 40 years between two wharves but the plaintiff's wharf does not run at right angles but in the direction of the defendant's wharf the former cannot restrain the latter from building on to his wharf at right angles, although if both wharves were extended along their present lines they would meet before they reached the channel and close up the public landing place, *Lane v. Smith Bros. Inc.*, (Conn. 1907) 67 Atl. 558. An irrigation company, holding land beneath a lake under a United States patent previous to the adoption of the State constitution, erected a dam across an arm of the lake and irrigated the land. When the plaintiff owning riparian lands at the end of the arm was thus cut off from the use of the water, the fact that he had remained silent although he knew of the money the defendant was expending in building the dam, did not estop him from raising any objection; but he had a right to have the use of the dam enjoined unless condemnation proceedings were begun to condemn his riparian rights, *Madson v. Spokane Valley L. & W. Co.*, 40 Wash. 414, 82 Pac. 718.

Ferry. An act passed Feb. 27, 1879 authorized a railroad company to purchase the franchises and property of a company and by that act it was provided that the railroad company furnish the transportation of persons and produce across the James River. The Act of May 20, 1887, (Acts 1887, Ex. Sess, p. 422, c. 329), provided that by reason of complaints of serious injuries caused by the maintenance of certain dams across the waterway, commissioners should be appointed to report the feasibility of removing the dams. Then the railroad company or its successors should be authorized to remove the dams reported as proper for removal, and for such removal the railroad company should not be liable for any damages arising therefrom. By the removal of a dam under this act, thereby preventing the running of a ferry across the river, the railroad was not required to furnish a bridge in lieu of ferries, *Chesapeake & O. Ry. Co. v. Commonwealth*, (Va. 1906) 54 S. E. 331.

Sec. 622. Logging—Booms. An injunction preventing a log company's floating logs down a river by means of splash dams and freshets so that the plaintiff's land was damaged, will not be interfered with by the supreme court pending an appeal, and prohibition will not lie, *State ex. rel. Burrows v. Superior Court*, 43 Wash. 225, 86 Pac. 632. A stream on which logs may be floated at certain periods of the year is a navigable stream, and a company floating logs on it is not liable for a jam which causes a rise in the water and consequent damage to the land of a riparian owner, unless the company is negligent and does not use due care in making the drive, *Hot Springs L. & M'fg. Co. v. Revercomb*, 106 Va. 176, 55 S. E. 580. Where the defendant negligently floated shingle bolts on a river so a jam was formed which resulted in the washing away of a large portion of the plaintiff's land 6 to 10 feet in width for 1,000 feet, the plaintiff was entitled to damages, *Mitchell v. Lea Lumber Co.*, 43 Wash. 195, 86 Pac. 405.

When a stream has never been used for navigation and a riparian owner does not use it for that purpose, he can not remove obstructions in the stream such as a boom to catch drift wood. If the boom caused the water to back up on plaintiff's land he would have a cause of action, *Winsor v. Hanson*, 40 Wash. 423, 82 Pac. 710.

Right to unobstructed channel. An owner of a sawmill who receives logs in rafts by a river and ships by barges may enter suit against the construction of a railroad bridge if it will obstruct the logs coming to his sawmill or otherwise interfere with his business, but he is not entitled to an injunction unless the obstruction will cause unreasonable delay or if the channel through the draw will be too narrow for navigation, *Pedrick v. Raleigh & P. S. R. Co.*, 143 N. C. 485, 55 S. E. 877.

Sec. 623. Oysters. Alabama Code 1896, c. 84, which grants to owners of lands fronting on any bay a right to plant and gather oysters within 600 yards of the shore, construed, *Cain v. Simonson*, (Ala. 1905) 39 S. 571. Gen. St. 1902 §3241, relating to the power of a court to order the seizure and sale of a boat illegally dredging oysters, was construed, *State v. The Greyhound*, (Conn. 1907) 66 Atl. 511. Code Pub. Gen. Laws Art. 72 s. 8 upheld in *Windsor v. State*, 103 Md.

611, 64 Atl. 288. After the execution of a lease of shore lands the lessees procured a grant from the county of the right to cultivate oysters in the adjoining waters. Subsequently the owners conveyed to the lessees in fee reserving all aquatic rights. Held, the reservation was not of a thing which would otherwise have passed by the deed and did not take away the oyster privilege, *Barataria Canning Co. v. Ott*, 84 Miss. 737, 37 So. 121.

At common law a person desiring to cultivate oysters was required: (1) to stake or mark out the lot that he proposed to occupy for that purpose, and to continue to keep it so marked and (2) he must actually plant or cultivate oysters thereon, and as long as he continued to do this his right to the oysters was protected; but failing to keep his territory marked so that others may know the location of his property or in failing to cultivate or work his bed his exclusive right thereto was no longer enforceable at law, and the rights of the public to fish or gather oysters thereon was no longer protected by the courts. The same rule prevails under N. Y. Laws 1887, p. 797, c. 584, *Vroom v. Tilly*, 184 N. Y. 168, 77 N. E. 24.

An indictment framed under the Penal Code of 1895 §588, charged two men with the theft of oysters from a private bed, without the knowledge of the owner. The defendants contended that a muniment of title could not be produced and that parol evidence was inadmissible. It was decreed, that "relatively to a trespasser who is indicated under this section the ownership of the oysters is immaterial," *Houston v. State*, 124 Ga. 417, 52 S. E. 757.

A charter conferred upon a company the right to construct, operate, and maintain a dry dock of such proportions as it might deem proper, with wharves, docks, etc., and to build and repair steamships, ships and vessels. It was necessary to erect a breakwater and to dredge the river for these purposes destroying part of an oyster bed location. The dredging was a lawful exercise by the corporation of its charter powers, for which it was in no way liable to appellee for damages, *Newport News Shipbuilding & Dry Dock Co. v. Jones*, 105 Va. 503, 54 S. E. 314.

Sec. 624. Riparian rights and obligations of municipal corporations. A city, if not forbidden, may accept the grant of land for a street, and will be entitled to its share of de-

posit on the shore of a lake to which the street runs, *Hathaway v. City of Milwaukee*, (Wis. 1907) 111 N. W. 570.

The mere fact that a stream flowing through a city has been declared a public highway and the city has used it for the discharge of drainage does not make it liable to a landowner, whose premises were damaged by an overflow in time of extraordinary freshet, *O'Donnell v. Syracuse*, 184 N. Y. 1, 76 N. E. 738. A city, authorized by Mass. St. 1867, p. 541, c. 106 to fix the boundaries of a creek, which diverted the water therefrom above a mill and discharged into the same stream below the mill, was liable to the mill owner for damages, *Stevens v. Worcester*, 196 Mass. 45, 81 N. E. 907.

A city located several miles from a river and owning no land abutting thereon has no riparian rights and cannot restrain the pollution of a stream from which it gets its water supply, *Durham v. Eno Cotton Mills*, 141 N. C. 615, 54 S. E. 453. Where a municipality buys a piece of land on a non-navigable stream several miles distant from its own limits, it does not in consequence, as a riparian owner, become entitled to supply the inhabitants of the city with water from the stream, *City of Elberton v. Hobbs*, 121 Ga. 749, 750, 49 S. E. 779.

Sec. 625. Mill rights—Rights to erect dams and flow lands.

Grants of water power construed. As to how many hours per day the Libbey and Dinbley Company, owners of the Lincoln Mill, so called, at Lewiston, Maine, may use the water power created by the dams, canals, and headgates on the Androscoggin River, see *Union Water Power Co., v. Libbey & Dingley Co.*, 102 Me. 439, 67 Atl. 357. When the owner of a dam granted the right to use water for a tannery through an opening in the dam and nothing was said about the head of water to be maintained, the grantor was compelled to maintain the customary head used at the time of the grant, *Oakland Woolen Co. v. Union Gas & E. Co.*, 101 Me. 198, 63 Atl. 915. A grant to the city gave 600 horse power, and a further clause defined the grant as "so much water every 24 hours as six hundred horse power at a head of 25 feet will pump to a height of 220 feet 12 hours in every 24," used on a certain lot of land. The city claimed this grant meant 600 practical horse power no matter whether the plant was efficient

or not, but the court construed the grant as meaning 600 horsepower which should have developed by a plant in a fair state of efficiency or a plant producing power at a loss of only 25 per cent. The city was therefore entitled to 800 theoretical horse power, but was not entitled to take any more if the plant on account of poor conditions or unskilled operation did not produce as much as 600 horse power. As the city had been taking more power it was compelled to pay a fair value for the excess power taken, *Union Water Power Co. v. Inh'ts. of Lewiston*, (Me. 1906) 65 Atl. 67. An act granting a company the right to maintain a dam in a stream, provided that it should allow water to flow from the dam to assist a log driving company under a thirteen foot head from the bottom of the dam. When a new dam was built the log driving company was only entitled to the use of a thirteen foot head above the bottom of the old dam which rested on the bed of the stream and it was not entitled to a thirteen foot head above the sills of the large gates in the old dam, *Penobscot Log Driving Co. v. West Branch D. & R. Dam Co.*, (Me. 1906) 66 Atl. 542. A grantor conveyed a narrow strip of land along the river with all the water privileges, agreeing to hold the grantee harmless against any damage that might accrue from ponding of the water on his other land in case of the erection of a dam. A subsequent purchaser from the grantor took subject to the rights of flowage but the easement of flowage was not greater than would have been used by the erection of the dam at the height originally contemplated when the easement was purchased, *Towaliga Falls P. Co. v. McElroy*, 124 Ga. 1014, 53 S. E. 682.

A deed of land to a company building a factory which consumed a great deal of water granted "the right at all times to the free and unobstructed use of the waters of the spring and pond," and it was construed as granting to the company the right to enter and take water for its use, but without the right to compel the storage of water in the pond for their use as the pond had not been a permanent one.

When the defendants opened a new ditch so that the plaintiff company was deprived of all the water it was a breach of their right to use the water and a permanent injunction was granted, although the defendants could take water by means of their old ditch and clear it from obstructions so as to deepen

it to its regular level when it became filled with debris, *F. S. Royster Guano Co., v. Fowles*, 75 S. C. 434, 56 S. E. 11.

Draining mill pond dry. A riparian owner had a summer place on Long Pond and when the owner of the dam and mill privilege allowed the water to drain from the pond by his use in the summer months, forming a nuisance on account of the smell from the mud flats exposed, the riparian owner had no right to damages, *DeWitt v. Bissell*, 77 Conn. 530, 60 Atl. 113.

Flowage rights. If the owner of a boom causes the water in a stream to back up and interfere with the working of a mill, the mill owner is rightfully entitled to damages, *Pickens v. Coal R. B. & T. Co.*, 58 W. Va. 11, 50 S. E. 872. The riparian owners along a river entered into an agreement for a valuable consideration whereby the owners of a dam for power purposes agreed to reduce their dam and remove all obstructions from the bed of the river at certain falls so that the marsh lands of the riparian owners should be drained. For 80 years the obstructions were removed in accordance with this arrangement and a company which proposed to erect a dam for electric power was enjoined, *Cloyes v. Middlebury E. Co.*, (Vt. 1907) 66 Atl. 1039. The rights of the owners of certain water lots in the City of Columbus were considered and likewise the powers of a corporation created by special charter to manage them and after elaborate discussion it was—Held, that two estates united in the same person A, merger taking place, therefore the covenants of the original deeds from the city were not carried forward into subsequent conveyances; and the putting of this property in the hands of a corporation with broad powers indicated no legislative intention to place restrictions upon the use of water by the owners of different lots otherwise than as might be agreed on between the company and purchasers, *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 126 Ga. 210, 54 S. E. 1028. A lower riparian owner erected a dam which caused the tailings from placer properties to be backed upon the plaintiff's lower mining ground, which they were not using at the time, and there was no damage to the upper mining property which the plaintiffs were mining. Under these circumstances a removal of the dams by the upper riparian owners was without right, but they were entitled to have the dam removed when they commenced working in good faith their lower mining property, *Kane v. Littlefield*, 48

Ore. 299, 86 Pac. 545. One who raises the water of a stream by damming is liable to the owners of lands flowed for damage done at all ordinary stages of water, including ordinary and usual freshets, *Allen v. Thornapple Elec. Co.*, 144 Mich. 370, 108 N. W. 79.

Flowage rights by prescription. "Occupation and a use of a right of flowage or pondage, in order to create a prescriptive right, need not be constant in the sense of a daily occupancy or use. It must be continuous and uninterrupted, but not necessarily constant," *Reason v. Peters*, 148 Mich. 532, 112 N. W. 117. The law is well settled that before a prescriptive right to flood the lands of another can be sustained, it must appear (1) that the lands have been flooded for a period of 20 years or more; (2) that the flooding was adverse and uninterrupted; and (3) that the flooding took place with the knowledge and acquiescence of the landowner, *Wills v. Babb*, 222 Ill. 95, 78 N. E. 42. Ten years user of water in substantially the same way by an upper riparian owner with the knowledge of and without interruption by a lower owner raises a presumption of title as against the latter's rights, *Alabama Coal Co. v. Turner*, 145 Ala. 639, 39 S. 603.

Effect of flood or freshet. Where one built dams strong enough to withstand an ordinary freshet he is not liable for damage caused by the breaking of a dam in an extraordinary flood, *Alabama Coal Co. v. Turner*, 145 Ala. 639, 39 S. 603. When it is not proved that a dam is improperly or negligently constructed the owners of the dam are not liable for an injury to the highway at flood time occasioned by a deflection of the current towards the shore on which the highway is located, when the use of the water is reasonable. This wearing away of the shore amounts to *damnum absque injuria*, *Inhabitants of Durham v. Lisbon Falls F. Co.*, 100 Me. 238, 61 Atl. 177.

Reasonable use of water. A complaint which alleges that the defendant is diverting water from a stream thereby injuring the plaintiff in the use of his mill, and that the defendant's dam collects debris which has filled up the plaintiff's dam so as to materially lessen the amount of water usually flowing there states a good cause of action, *Alabama Coal Co. v. Turner*, 145 Ala. 639, 39 S. 603. In an action at common law to recover damages for wrongfully increasing the volume of a stream by opening mill dam gates so as to overflow its banks and the plaintiff's meadow below the question of whether

or not the exercise of the defendant's rights was reasonable is for the jury. An action under the mill act of Maine cannot be brought for flowing lands below a dam, *Barker v. French*, 102 Me. 407, 67 Atl. 308. It is not unreasonable for a mill owner when desirable to use the water in the stream at night as well as in the day as long as he leaves the natural flow unobstructed and undiminished during the ordinary working hours of the day. When the upper owner maintains a reservoir to store water that falls in the wet season to be let down in the dry season the increased flow may be treated as part of the natural flow in determining the rights of a lower mill owner with regard to the use by still lower owners, but the upper owner is not obliged to hold back water at night in order to allow a lower owner to use it more profitably the next day, *Mason v. Whitney*, 193 Mass. 152, 78 N. E. 881. A riparian owner had a number of water wheels on the river and a large dam, and he closed the gates after working hours to permit the water to accumulate in the ponds as was the custom of other mills on the river and used the water reasonably. Under these circumstances a lower riparian proprietor did not have a right to bring suit although the flashboards had been raised and more power was used, as the upper riparian proprietors had a right to detain the water for power when they let it all down the river after using it. The plaintiff might raise its dam so as to retain more of the water let down, but it had no other remedy where the use was reasonable, *Hazard Powder Co. v. Somersville Mfg. Co.*, 78 Conn. 171, 61 Atl. 519.

Equitable relief. Where a lower mill owner has raised the height of his dam so that the upper mill owner is unable to obtain sufficient power on account of the water backing against the mill wheel, it is an injury which is not susceptible of adequate compensation at law and the court may grant an injunction, *Royce v. Carpenter*, (Vt. 1907) 66 Atl. 888.

The application for an injunction against the employees of a certain corporation, who were preparing to obstruct the river below the property of the petitioner by the erection of a dam thereby causing the overflow of said river upon the most valuable portion of petitioner's property and by seeping and percolation rendering the bottom land unfit for cultivation was affirmed. Evidence showed that the building of the dam at the proposed height would damage the petitioner. At a hearing to be had at the instance of the corporation the judge would

be authorized to determine at what height a dam could be erected without injury to the petitioner and an injunction simply enjoining the corporation from erecting a dam of greater height, would effect the object of the petitioner, *Warner v. Maxwell*, 124 Ga. 518, 52 S. E. 809. To protect a landowner against constant or frequently recurring injuries from the wrongful diversion of water caused by a dam equity has jurisdiction concurrent with courts of law, and will enjoin the wrong doer without regard to his ability to respond in damages, since a single action at law will not furnish an adequate remedy, and a multiplicity of suits can be avoided by proceedings in chancery. A period short of the statute of limitations will not constitute laches in such a case, *Cobia v. Ellis*, (Ala. 1906) 42 S. 751.

The statutes authorizing the construction of dams and development of water powers do not justify the obstruction of a navigable river for a power plant for the production and distribution of electricity to the public, *Minn. Canal & Power Co. v. Koochining Co.*, 97 Minn. 429, 107 N. W. 405. Act approved Oct. 1, 1903, conferring additional powers on corporations organized to supply power produced by water is amended and enlarged by Ala. Laws of 1907, No. 339. Persons, firms and corporations organized to develop and distribute water power and owning lands on both sides of navigable rivers are authorized to construct dams and locks in the streams by Ala. Laws of 1907, No. 290.

Limitations. If land has not been injured by flowing by the erection of a mill dam for three years so the owner would have had a right to bring suit for damages under the mill act (Rev. St. c 94), the statute of limitations does not begin to run in favor of the mill owner until the right of action for damages accrues; therefore although the land had been flowed for twenty years altogether, a right to flow by prescription had not been acquired as there was no damage during the first three years, *Foster v. Sebago Imp. Co.*, 100 Me. 196, 60 Atl. 894.

Sec. 626. Obstruction of waters—By dams or otherwise—Damages. If a water course is dammed and the dam caused ponding of the water on the plaintiff's land to any appreciable extent, he is entitled to recover nominal damages, *Chaffin v. Fries Mfg. & P. Co.*, 136 N. C. 364, 48 S. E. 770.

A stream which is not capable of floating logs in the ordinary winter freshets is not navigable, and the operation of a splash dam may be enjoined, although sometimes small logs for a short time float on the stream, *Kamm v. Normand*, (Ore. 1907) 91 Pac. 448. Land on the bank of a river was flooded and damaged by the erection and maintenance of a dam near and below said land. Neither sympathy nor prejudice must affect a decision as to the true measure of damages which in this case is the difference in the value of the land of the plaintiff that is affected by the water just after the erection of the dam, and its condition just prior to it, *Brown v. W. T. Weaver Power Co.*, 140 N. C. 333, 52 S. E. 954. A dam had been built below a bridge, but where it was proved that the flood gates were left open and that all due precautions were taken by the owner of the dam he was not responsible for the destruction of the bridge by a very large mass of ice loosened by the high water Mississippi River, so that in time of high water it became an arm of the river with water flowing into it at the north end when rains and the melting of the snow came together, as that was an extraordinary and unexpected occurrence not to be anticipated, *Inhabitants of Palmyra v. W. W. Co.*, (Me. 1906) 66 Atl. 646.

A depression or slough separating an island from the and flowing out at the south end and also forming a drain for surface water was a "natural" water course. The measure of damages for injury to growing crops caused by its obstruction and consequent overflow, was the value of the crops at the date of destruction and the owner's right to harvest them later, *St. Louis Merchants &c. Assn. v. Schultz*, 226 Ill. 409, 80 N. E. 879. By the act of 1899 (23 St. at Large p. 207) a company was authorized to build a dam across a river providing "that said corporation shall be liable for all damages caused by building said dam." In building the cofferdam in the river the flood waters of the stream were thrown with great force against the plaintiff's land so that it was torn away and sand and gravel deposited on the fields. Although the company was not proved to be negligent yet the act of the legislature making it liable for all damages evidently intended to include all damages whether caused by negligence or not, *Sutton v. Catawba Power Co.*, 76 S. C. 320, 56 S. E. 966.

Where a riparian owner erected a dam so as to prevent the water running down the ordinary flood channel of the

river, joining his dam with the dam of another riparian owner who built a dam parallel to the river, he was responsible for damages when the dam of the adjoining riparian owner was broken on account of ponding of the water caused by the erection of the new dam across the flood channel. The fact that the plaintiff's dam had never broken before the erection of the new dam, and had broken three times since tended to show that the erection of the new dam was the proximate cause of the breaking of plaintiff's dam and the consequent injury to his land, *Clark v. Patapsco Guano Co.*, 144 N. C. 64, 56 S. E. 858. "Overflow waters from a natural stream in times of flood or freshet, flowing over or standing upon adjacent lowlands, do not cease to be part of the stream unless or until separated therefrom so as to prevent their return to its channel," *Brinegar v. Copass*, (Neb. 1906) 109 N. W. 173. When a landowner erects an embankment to prevent the storm waters of a ravine flowing across his land and turns his water by a different channel to a canal which the water fills in a storm so as to flow upon the plaintiff's land carrying mud and debris, the landowner is liable for damages, *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92. The defendant, engaged in building operations, filled up a drain on a street, and when a cloudburst came the plaintiff's basement was flooded on account of the defendant's negligence, and he was liable for damages, *Mulrone v. Marshall*, (Mont. 1907), 88 Pac. 797. A suit to abate an obstruction of a navigable stream may not be maintained by an individual unless he proves some special damage, *Thomas v. Wade*, 48 Fla. 311, 37 So. 743.

Sec. 627. Obstruction of waters—Liability of railroad.

Railroad's liability for obstruction of surface water, see *post*, §632. Where a railroad built dams along a river bank which deflected the current so that at every successive rise of the river some of the riparian owner's land on the opposite bank was washed away the latter could sue separately for each injury, *Gulf C.&F. Ry. Co. v. Moseley*, (Ind. Terr. 1906) 98 S. W. 129. A person in actual peaceable possession of land under claims of ownership or color of title may recover damages for flooding the lands caused by the obstruction of a stream by a railroad bridge. Various questions as to the pleadings and evidence in such an action discussed, *Southern Ry. Co. v. Leard*, 146 Ala. 349, 39 S. 449.

Negligence. A railway acquired a right of way ten years previous to the enactment of Code 1902, s. 1456 forbidding the obstruction of water-courses, and, therefore, when the plaintiff's land was damaged it was only liable if the damage was caused by negligence, *Lampley v. Atlantic C. L. R. Co.*, 71 S. C. 156, 50 S. E. 773. When the channel of a canal to convey water was cut at right angles to the stream so that the water would be carried by its own momentum on to the plaintiff's land across the channel, he was entitled to damages, *Craft v. Norfolk & S. R. Co.*, 136 N. C. 49, 48 S. E. 519. In an action for damages to the bottom lands of the plaintiff by water overflowing the track of the defendant railroad and ponding thereon, the allegations of negligence were that the defendant railroad had negligently permitted the ditch on its right of way on the north side of the track, where it passed over the plaintiff's land, to remain filled up and unopened, and the water overflowed the track and ponded itself in his bottom lands on the south side of the track, injuring the land materially; side ditches constructed by the defendant were also filled with dirt and trash from the plaintiff's land above and failed to carry off all the water during hard rains. The lower proprietor must receive the surface water which falls on adjoining higher lands and naturally flows therefrom, and the plaintiff has no ground for his complaint, *Greenwood v. Southern Ry. Co.*, 144 N. C. 446, 57 S. E. 157.

Culvert. Hurd's Illinois Rev. St. 1905, c. 114, section 20 requiring railroads to construct necessary culverts in connection with embankments applies to a subsequent transferee of such railroad, *Tetherington v. St. Louis T. & E. R. Co.*, 226 Ill. 129, 80 N. E. 697. If the lessee of a railway builds an addition to a culvert, and the addition breaks down, damming a stream and causing a washout of the culvert by which the plaintiff was damaged, the lessee is liable for the damages, *Shores v. Southern Ry. Co.*, 72 S. C. 244, 51 S. E. 699. A railroad company is liable for damages for failure to make a culvert in an embankment constructed by it of sufficient size to carry off the overflowing waters from a flood, *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 49 S. E. 378. An action brought against a railroad company to recover damages to plaintiff's land by the building of a culvert which caused ponding of water thereon more than five years previous to the beginning of the action in a similar manner to that which existed at the time the

action was brought is barred by the statute of limitations, *Stack v. Seaboard Air Line Ry. Co.*, 139 N. C. 366, 51 S. E. 1024.

Flood waters. Where a railroad company built a culvert which was insufficient to carry the flood waters of a creek, it could not rely on the contention that the flood water was surface water which it was entitled to repel as the flood waters of a stream are regarded as part of the stream, and the company was liable for damages unless it were shown that the flood was so unprecedented that it could not reasonably have been expected, *Price v. Oregon R. Co.*, 47 Or. 350, 83 Pac. 843. Although the defendant railroad had obtained a license from the owner of riparian land to build obstructions into the channel to protect the railroad, the company had no right after a change in the channel of the stream to build jetties causing the water to remain in the new channel and flow directly on to the plaintiff's land so that in case of a freshet it would be seriously damaged, and the plaintiff was entitled to have the nuisance abated, *Morton v. Ore. S. Line Ry. Co.*, 48 Ore. 444, 87 Pac. 151.

Limitations. When a continuous nuisance is created by a railroad's damming a river so that the plaintiff's lands are flooded, the fact that the negligent construction of the embankment was completed more than six years before the time of beginning the action does not bar the plaintiff's right to recover under the statute of limitations, but he can recover for damages which he has sustained within six years from the time of bringing suit, *Lawton v. Seaboard Air Line Ry.*, 75 S. C. 82, 55 S. E. 128. Where a railroad allows a water course running under a trestle to be obstructed by debris at the trestle the statute of limitations against action by a landowner for damage caused by the overflow of his land runs from the date of the damages, *St. Louis I. M. & S. Ry. Co. v. Hoshall*, (Ark. 1907) 102 S. W. 207.

Sec. 628. Reservoir—Doctrine of *Fletcher v. Rylands* disapproved.

A non-riparian owner injured by water percolating from a reservoir built by a riparian owner cannot recover damages unless he shows that the owner of the reservoir was unreasonable in his use of the stream or negligent in allowing the water to escape. The doctrine of *Fletcher v. Rylands*, 3 H. L. Cas.

330 disapproved, *Moore v. Berlin Mills Co.*, (N. H. 1907) 67 Atl. 578.

Where real estate was damaged by the collapse of a reservoir and the owner was killed, the question whether the heirs had a right to the damages to the land, or the executor of the owner, depended on whether the owner died at the time of the destruction of the property or not, *Mast v. Sapp*, 140 N. C. 533, 53 S. E. 350.

Sec. 629. Percolating waters. When the waters of a stream sink in a cienaga or marsh and flow under ground to a creek below, the waters are not percolating waters and may not be appropriated as such, but they are an underground stream and a prior riparian appropriator is entitled to their use, *Cave v. Tyler*, 147 Cal. 457, 82 Pac. 64.

Where an owner of land searches for and produces subterranean water within the boundary of his own land, he is limited to such reasonable use of said water, as will not injure the supply of a valuable natural spring on adjoining land, *Pence v. Carney*, 58 W. Va. 296, 52 S. E. 702. If percolating waters are taken from the defendants own land, which would not naturally flow upon the plaintiff's land, the plaintiff has no right to complain, especially when the water has been developed by tunnels in the solid rock, *Cohen v. La Canada L. & W. Co.*, (Cal. 1907), 91 Pac. 584.

The plaintiff brought water from the Conejos River to its land situated on the La Jara river and the flow from seepage of the La Jara river was materially increased thereby, but he had no right to drive piles in the river channel to cause the water to rise and then divert it by a dam, when he had no right to it by prior appropriation. The burden of proof rests on the plaintiff to prove how much water comes from the Conejos, and where the evidence contains no estimate of the increase due to that source there is nothing on which to base a finding for the plaintiff. A great many streams have well defined subterranean channels so that it does not necessarily follow that water rising in the bed of a river comes from seepage from the land of the adjoining riparian owners, *La Jara C. & L. S. A. v. Hansen*, 35 Colo. 105, 83 Pac. 644. When a right of way for a ditch had been condemned across land by a canal company it acquired no right to any of the percolating waters on the land, especially when the owner had often appropriated the

water for irrigation under claim of right, and he was entitled to a right of way across the canal to convey the spring water, provided such right of way did not interfere with the operation of the canal, *Smith Canal or Ditch Co. v. Colorado I. & S. Co.*, 34 Colo. 485, 82 Pac. 940.

Mills Ann. St. s. 2269, relating to the appropriation of seepage or percolating water, does not apply to one who digs a ditch parallel to land where water is being used and collects the waste water to use on her own lands, and she has no right for relief when the defendant digs a ditch himself to collect the waste water and carries it on to another tract of his own land, *Burkart v. Meiberg*, 37 Colo. 187, 86 Pac. 98.

Sec. 630. Artesian wells. A water company taking water for a city supply from artesian wells on its own land has no vested right to deprive neighboring owners of wells of pure water provided in the natural use of their wells by the use of force in pumping the basis of supply to a low level, *Erickson v. Crookston Waterworks, Power & Light Co.*, 100 Minn. 481, 111 N. W. 391.

Sec. 631. Pollution of streams. Although the careful operation of oil wells on land adjacent to a stream causes salt water by gravity to run into the stream so as to make its waters unsuitable for the generation of steam, a lower riparian owner who has been accustomed to use them to generate steam may not have such operation enjoined if he can obtain suitable water from another convenient source or may use the water of the stream itself at a reasonable and ascertainable expense, *Salem Iron Co. v. Hyland*, 74 Ohio St. 160, 77 N. E. 751.

Mass. Rev. Laws, c. 91, section 8, gives the fish commissioners the power, upon determining that the fish in a stream are of sufficient value to warrant protection, to prohibit or regulate the discharge of sawdust therein. It makes no difference that the defendants were denied a hearing and had been operating their sawmill for over 30 years, *Commonwealth v. Sisson*, 189 Mass. 247, 75 N. E. 619.

Sewage. Where a municipality constructed a sewerage system, which emptied into a small stream and polluted the water, so that a lower riparian proprietor was unable to use the water for irrigation, he was entitled to damages. For a full discussion see *Markwardt v. City of Guthrie*, 18 Okl. 32, 90

Pac. 26. Where a sewer is built into the waters of a Hot Spring Run so they can no longer be used for bathing purposes or drinking or medicinally, the plaintiff is entitled to recover damages for permanent nuisance especially when the plaintiff had built large stables, cottages, etc., on its property and was heavily damaged by the pollution of the stream. But if the sewers were permanent in their character, and the plaintiff had neglected to make complaint for five years after the beginning of the proceedings it was estopped from claiming any damages, *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 56 S. E. 216.

Waste from mines. When coal or coke refuse from a stream is deposited on land, the coal company is liable for the injury to the riparian owner, *Day v. Louisville Coal & Coke Co.*, 60 W. Va. 27, 53 S. E. 776. The injury done the plaintiff's land abutting on a stream by impurities from the defendant's coal mine up stream is a wrong to possession but an allegation of ownership and permanent injury to the fee does not render the complaint demurrable, *Tutweiler Coal, &c., Co. v. Wheeler*, (Ala. 1907) 43 S. 15. A mining corporation dumped in three years 550,000 tons of waste material into a stream which was carried down stream until the flood waters deposited some of the slag, gravel and arsenic ore on the plaintiff's land, poisoning the soil so all vegetation was killed and the plaintiff was unable to raise his crops. This was a continuing nuisance so the statute of limitations did not apply and the plaintiff was entitled to recover damages, *Hill v. Standard Min. Co.*, 12 Idaho 223, 85 Pac. 907. The owner of land along a small stream who used the water for household purposes and a saw mill was entitled to recover for damages caused by the defendant who pumped water from its mine through a pipe and emptied it into the stream above the plaintiff's land, thereby rendering the water acid and unfit for domestic use and injurious to the boilers in the saw-mill, *Bowling Coal Co. v. Ruffuce*, (Tenn. 1907) 100 S. W. 116.

Waste from factories. For a decision as to the powers of the New Jersey State Board of Health to ask for an injunction against the pollution of the water of a stream from which a city gets its water supply, see, *Board of Health v. Ihnken*, (N. J. 1907), 67 Atl. 28. A riparian owner is entitled to an injunction against forty defendants, acting independently, from polluting the stream by discharging therein tanning re-

fuse and filth where the acts of all together created a nuisance. The case contains a valuable discussion of authorities, *Warren v. Parkhurst*, 186 N. Y. 45, 78 N. E. 579. A lower riparian owner is entitled to an injunction to restrain a woolen mill from discharging noxious substances from its mill into a stream whereby the purity of the water when reaching the plaintiff's premises was noticeably or appreciably affected, although such pollution did not interfere with the then user of the water by the plaintiff. The case contains a very valuable discussion of the authorities, *Parker v. American Woolen Co.*, 195 Mass. 591, 81 N. E. 468. An action brought by a lower riparian owner to recover damages for pollution of a water course is barred by Alabama Code, 1896, section 2801, subd. 6, being a one year statute of limitations. But evidence of the condition of the stream prior to one year before suit was brought was admissible to show the effect of the pollution on the plaintiff's land and the river. A deed of land adjoining his riparian land, the whole being used as one farm, was admissible, also evidence as to the effect of the pollution upon the crop, health of the plaintiff's family, and the fish in the stream, *Tutweiler Coal &c. Co. v. Nichols*, 146 Ala. 364, 39 S. 762. A paper company had acquired a right to use the water coming through a canal for power by a deed, and had an easement by over 20 year's adverse use to discharge water containing a fine lime bearing sediment into the canal. The sediment accumulated in the canal and was discharged in the spring into the water of the river which conveyed it to the mill pond of a company which used the water for dyes, and as the lime in the water made it very hard so dyes could not be used, the company brought suit with the canal company against the paper company. The discharge of the lime bearing water into the canal was not any injury to the canal as it did not interfere with its operation, and the canal company had no right of suit, especially after 20 years adverse use; but it was the act of the canal company in discharging the water which caused the injury and as it could discharge the water just as easily into another stream there was no right of action against the paper company, *Morris C. & B. Co. v. Diamond Mills Paper Co.*, (N. J. Law, 1905), 64 Atl. 746. A corporation supplied water from a river during a portion of the year, to a city for the use of its citizens for drinking and other purposes. An action was brought by the city against the E. Cotton Mills for the

purpose of restraining the pollution of said river by said Mill corporation. The city, being located several miles from the river and owning no land abutting thereon, has no riparian rights, *City of Durham v. Eno Cotton Mills*, 141 N. C. 615, 54 S. E. 453.

Sec. 632. Surface waters—Liability of railroad for diversion.

Railroad's liability for obstructing waters, see *ante*, §627.

In an action against a railroad for injury to crops and land by the division of the waters of a river by the works of the railroad company, where the plaintiff introduced no evidence that any part of the damage was due to a deposit of mud it was not admissible for the railroad company to show that a certain deposit benefited rather than injured the land, without any evidence as to the amount of the alleged benefit, *Ry. Co. v. Harbison*, (Tex. 1906) 90 S. W. 1097. The water flowing from a mountain side above the complainant's land through a ditch and under a railroad embankment was surface water, and should have been allowed to flow off naturally. The burden was on the lower land to thus receive it, and there was no right in the owner of the higher land by artificial obstruction designed for its improvement to relieve it from its natural disadvantages to increase the burden of the lower estate, *Alabama Gt. Southern Ry. Co. v. Prouty*, (Ala. 1907), 43 S. 352. A railroad company in the use of its right of way may not injure upper landowners by flooding their premises with surface water which had previously gone over the right of way when by reasonable care and expense a free passage might have been provided. The owner whose crops are thus injured may recover the damages and interest, *Little Rock & Ft. Smith Ry. Co. v. Wallis*, (Ark. 1907) 102 S. W. 390. When in an action by a landowner against a railroad for damage to crops caused by the negligent and unskilful construction of a railroad dump it appeared that in times of overflow the water was from 18 inches to 2 feet higher on the upper than the lower side of the dump, and remained so for several days longer than it would otherwise a verdict for the landowner of \$1,500.00 damages was sustained, *St. Louis Ry. Co. v. Saunders*, 78 Ark. 589, 94 S. W. 709.

Sec. 633. Surface waters—Right of landowner to drain on land of another. "The rule adopted in this state from the civil law, which, in general, makes land legally subservient to the natural flowage of surface water, does not apply under the artificial conditions created by the building of cities and the improvement of city lots," *Hall v. Rising*, 141 Ala. 431, 37 So 586. Upper owners may "rid their lands of surface water, as it comes thereon from any source, by permitting or causing the same, by such means as may be reasonably necessary, to flow in the natural course of drainage to and on to adjoining lands, though the same may by natural or by artificial means for which they are not responsible reach and spread out over" the lands of lower owners, *Shaw v. Ward*, 131 Wis. 646, 111 N. W. 671. Where a surface drainage ditch had been constructed through lands by the mutual consent of the landowners an owner was restrained from emptying sewage therein although his action would not constitute a nuisance or cause substantial injury, *Kenilworth Sanitarium v. Kenilworth*, 220 Ill. 264, 77 N. E. 226. To make out a case for damages due to the increased flow of surface water "it must clearly and satisfactorily appear, especially in injunction cases, that defendant is about to materially and unduly increase the flow of water to plaintiff's imminent damage," *Wirds v. Vierkandt*, 131 Ia. 125, 108 N. W. 108. Where two railroads and a city were alleged to have jointly held back surface water so as to flood the plaintiff's land they were all joint tort feasons and properly joined as defendants. The owner of a lower estate cannot fill up his land to use it in his business when the result is to turn back the surface water upon the upper owner. Neither can the upper owner make holes or drains by which the surface water is directed into a new channel or the lower ground, nor collect in one channel water which otherwise would flow by several channels. When the upper owner lived on the land damaged he is entitled to damages, not for the loss of "its rental value," but the loss of the value thereof for use, *Pickerell v. Louisville*, (Ky. 1907) 100 S. W. 873.

If an owner have upon his land when the surface is in its natural state, a basin in which water accumulates, and from which, when filled and overflowing, the water passes in a particular place where the rim of the basin is lower than elsewhere, and then flows through a depression to and upon the land of another, the natural outlet and natural course for that water

is through that low place in the rim and through that depression, and the owner may lawfully cut down the rim and deepen the depression upon his own land so as to entirely drain the basin and cause the water therefrom to pass through the depression to and upon the land of his neighbor, if the neighbor's land be low enough to entirely drain the basin, even though the amount of water flowing through this depression to the servient heritage is thereby increased, and water which would be retained in the basin if the rim and depression were left as in a state of nature and never reach the land of the neighbor, is thereby cast upon his heritage, *Fenton & Thompson R. Co. v. Adams*, 221 Ill. 201, 77 N. E. 531.

Construction of artificial courses for the discharge of surface water through pipes does not impose a liability on the one who lays them provided the water would naturally flow in the same direction, and in a channel substantially the same as the course of the drain, *Hull v. Harker*, 130 Ia. 190, 106 N. W. 629. "Causing surface water to flow in its natural direction through a ditch on one's own land instead of over the surface or by percolation as formerly, where no new watershed is tapped by said ditch and no addition to the former volume of surface water is caused thereby, except the mere carrying in a ditch what formerly reached the same point on defendant's land over a wider surface by percolation through the soil or by flowing over such wider surface, is not, when not negligently done, a wrongful or unlawful act," *Manteufel v. Wetzel*, (Wis. 1907) 114 N. W. 91. After the flow of surface water over plaintiff's land has been obstructed for 11 years by the closing of a sluiceway crossing a highway the plaintiff will not be permitted to restrain the authorities from opening the sluice for the natural flow, *Tower v. Township of Somerset*, 143 Mich. 195, 106 N. W. 874.

Sec. 634. Surface waters—Actions.—A cause of action for injury merely to the possession of land due to a diversion of surface water from its natural flow is in the person in rightful possession, not the landlord, *Louisville & N. R. Co. v. Moore*, 31 Ky. Law Rep. 141, 101 S. W. 934. An action at law is the proper remedy for the impounding of water on the plaintiff's land caused by the action of the defendants in constructing a dike above it and another below it, and then pumping water into it from their cranberry bog above, keeping it

there until they need it again, *Nye v. Swift*, 190 Mass. 143, 76 N. E. 652. A landowner who has received compensation for the taking of his land for a railroad may also have an injunction to prevent the turning of surface water upon his land in increased amount, *Abright v. Cedar Rapids & I. C. Ry. and Light Co.*, 133 Ia. 644, 110 N. W. 1052. Where the defense in an action for damages due to an overflow of surface water caused by an alleged defect in a railroad embankment is that it was caused by an act of God, the verdict of the jury will not be upset upon appeal, *Chicago, P. & St. L. Ry. Co. v. Reuter*, 223 Ill. 387, 79 N. E. 166.

Where a railroad built an embankment along side of a ditch through which surface water drained from the plaintiff's land a judgment for damages caused by the negligence of the company in failing to prevent dirt falling from the embankment into the ditch and obstructing it was not a bar to a later action for damages caused by another occurrence of the same thing, *Chicago, R. I. & P. Ry. Co. v. McCutcheon*, 80 Ark. 235, 96 S. W. 1054.

The plea of increase of value by the construction of a road, or that if there is no decrease of market value there can be no recovery of damages, does not apply where surface water was collected in a ditch on a county road and cast upon land, *Tracewell v. Wood County Court*, 58 W. Va. 283, 52 S. E. 185.

Sec. 635. Surface waters—Liability of municipalities and their officers.—A municipal corporation has no greater right than a natural person to direct surface water in large quantities by an artificial channel upon the land of another; except it may do this in the exercise of eminent domain, upon making just compensation. Such expropriation will be enjoined until the damages are ascertained, and paid in the manner provided by law, *Elser v. Village of Gross Point*, 223 Ill. 230, 79 N. E. 27. In an action against a town for damages to the plaintiff's land caused by the discharge of surface water the evidence was held to show an unnecessary and unreasonable change in the course of the surface water, to which the contour of the land was not adapted, so as to bring it down in large quantities to a place from which it could not escape, and where its presence would be likely to cause a nuisance, *Daley v. Watertown*, 192 Mass. 116, 78 N. E. 143.

A road supervisor and persons working upon the roads

under him are liable for damages caused by the diversion of water from its natural source and throwing it upon another's land, where the public has no such right, irrespective of their motives, *Wrightsel v. Fee et al.*, 76 Ohio 529, 81 N. E. 975.

WAYS

See Easements—Highways.

Acquisition of right by adverse use, see *ante* §105.

Private ways, see EASEMENTS.

Public ways, see HIGHWAYS.

WILLS

Advancements, see *ante* §95.

Power of executors to sell and convey, see *ante* EXECUTORS.

Rights of creditors against devisees, see *ante* §96.

Deeds distinguished from wills, see *ante*, §66.

Perpetuities created by, see *ante* PERPETUITIES.

Sec. 636. Execution and validity—Holograph—Nuncupative—Statutes as to—What law governs. A letter written by testator on the day of his suicide to his wife containing the following phrase "whatever I have in worldly goods, it is my wish that you should possess them" was a will, *Arendt v. Arendt*, 80 Ark. 204, 96 S. W. 982. A testator, a native of Germany and known there as Carl F. Theilig, and in the United States as Charles F. Tyler, signed his will with both names. The alternative expression was merely a means of identification, not affecting the devise in remainder, *Tyler v. Thielig*, 124 Ga. 204, 52 S. E. 606. Although a will made just previous to a journey contained the condition that "should anything befall me while away or any accident happen to me," it was valid on the testator's death after his safe return, when he had republished it in the presence of his wife and another witness. *Forquer's Estate in re.*, (Pa. 1907) 66 Atl. 92.

Capacity. The testator was afflicted with Bright's disease at the time he signed a will and a physician testified that Bright's disease ultimately causes mental incapacity, and that he was not competent to sign the will but when the bulk of the testimony proved that the testator had been very sound mentally throughout his life and there was no testimony to prove by his acts or words at the time of signing the will that he did not possess testamentary capacity, the will was valid, *Horner v. Buckingham*, 103 Md. 556, 64 Atl. 41.

Undue influence. Although it is proved that a testatrix adopted the suggestions and arguments appealing to her judgment and changed her will on that account, that does not show undue influence on the testatrix sufficient to invalidate the bequest unless she yields because of importunity or weakness. When A had performed numerous services for the testatrix and the bequests to other legatees had been made, it was not undue influence for A to suggest a bequest to himself of a certain sum and the residue, when the testatrix intelligently adopted the suggestion and incorporated it into her will as a fitting way to reward A. Appeal of O'Brien, *In re Campbell's will*, 100 Me. 156, 60 Atl. 880.

Holograph. Kentucky Statutes 1903, section 4828 and 4834 as to the execution of wills and their revocation, construed with relation to holographic wills, *P'Pool's Exr. v. P'Pool's Ex'x.*, (Ky. 1905), 89 S. W. 687. A holograph will of the testatrix recording the requests of the deceased husband, was a testamentary disposition of the property so conveyed by legacies, *Kerr v. Girdwood*, 138 N. C. 473, 50 S. E. 852. Shannon's Tennessee Code section 3896 as to holographic wills construed and it was held that a paper found in a box where the deceased, a country postmaster, kept postage stamps and stationery belonging to the United States, was not found "among his valuable papers," within the meaning of the statute, *Brogan v. Barnard*, 115 Tenn. 260, 90 S. W. 858.

Nuncupative. Under Louisiana Code art. 1578, a nuncupative will must be dictated by words pronounced orally, *Succession of Theriot*, 114 La. 611, 38 S. 471. A nuncupative will by private act is not invalid because written in the presence of the five attesting witnesses, without formal dictation, *Dielman v. Reems*, 115 La. 102, 38 S. 930.

What law governs. A will made in Louisiana, by a citizen of Louisiana, disposing of real estate situated in Missis-

issippi, is governed, as to form, by the law of Mississippi, Succession of Hasling, 114 La. 293, 38 S. 174. When a will is not witnessed but is valid in France where it was executed, it is valid in Maryland, and it will pass the title to real estate, and when the will is written in French, all the French terms will be given their French interpretation if it is the testator's evident intention that the terms shall be used in their broader foreign sense, (see Code Pub. Gen. Laws 1904, Art. 93, Sec. 327), Lindsay v. Wilson, 103 Md. 252, 63 Atl. 566. The N. Y. Domestic Relations Law, Laws 1896, p. 225, c. 272, which provides that nothing therein contained as to adopted children shall apply to any "will, devise or trust" created before 1873 and that as to such an instrument a child adopted before that date is not an heir does not prevent a child adopted in 1883 by a beneficiary for life with remainder to her heirs from taking as an heir thereunder, although the deed of trust was executed in 1853. The testator threw the responsibility of the selection of his heirs upon the law existing at the time of the life tenant's decease, Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697.

Sec. 637. Attestation.—Where instruments in form deeds, but testamentary in character, were signed by the grantor's husband as well as the grantor and acknowledged before a notary there was no attestation before two competent witnesses, Gump v. Gowans, 226 Ill. 635, 80 N. E. 1086. Under Code 1887, §2544 [Va. Code 1904, p. 1297], it is unnecessary that the testator expressly requests each attesting witness to sign a will, provided each witness signs in the presence of each other and the testator, Savage v. Bowen, 103 Va. 540, 49 S. E. 668. Where a witness has taken part in the physical act of writing her name as witness, at the request of the testator, and in his presence, she is an effectual subscribing witness to the will, which is unaffected by the fact that such witness was at the time able to write her own name, Bunker v. Bunker, 140 N. C. 18, 52 S. E. 237. In proceedings to probate a will an attesting witness may not be asked whether or not he would have signed as a witness except in the presence of the testator. Under Hurd's Illinois Rev. St. 1905, c. 148, section 2, upon an appeal from an order admitting the will to probate the only evidence admissible is that of the attesting witnesses, Greene v. Hitchcock, 222 Ill. 216, 78 N. E. 614.

Where the wife of a testator, while the alleged last will was being executed, ran into the kitchen where a witness was and got some water for the deceased, saying that "she was afraid her husband would die before they could get the business fixed," the testimony was not competent as a declaration against interest nor was it competent as a part of the *res gestae*, the remark not being made in the presence of the testator, nor any person connected with the will or the execution thereof, *Murray's Will*, in re (N. C. 1906), 54 S. E. 435.

Interest of attesting witness. Under Missouri Rev. St. 1899, section 4367 an executor as such is not incompetent as a witness to the will but when the will directed and empowered him to collect certain notes, and, after payment of certain debts, apply the remainder according to verbal instructions known only to himself, he took a substantial interest in sustaining the will, and was therefore incompetent, *Hogan v. Hinckey*, 195 Mo. 527, 94 S. W. 522.

Sec. 638. Agreement to devise—Oral. Upon the evidence it was held that no contract that upon the death of the intestate all her property should pass to the plaintiff was established, *Holt v. Tuite*, 188 N. Y. 17, 80 N. E. 364. Evidence examined and held not to show an oral contract by a father with his son to leave him certain land upon the former's death, *Watson v. Watson*, 225 Ill. 412, 80 N. E. 332.

Validity. Equity will entertain jurisdiction of a claim for specific performance of an agreement made by a deceased man to provide by will for his divorced wife, *Kundinger v. Kundinger*, (Mich. 1908) 114 N. W. 408. Where a settlor of a trust for himself for life with remainder to his legal representatives compromised his suit to set aside the trust for fraud by accepting a reconveyance and executing a contract to permit the land to descend to his legal representatives, the agreement constituted an enforceable agreement not to make a will, *Jones v. Abbott*, 228 Ill. 34, 81 N. E. 791. Where it was claimed a will had been surreptitiously destroyed by the widow after the testator's death which granted property to a devisee, and a settlement of the claim was made with the widow by which she agreed to devise the property on her death to the original devisee, the agreement was for a sufficient consideration, and was enforceable against the heir because equity considered the heir as a trustee, *Belt v. Lazenby*.

126 Ga. 767, 56 S. E. 81. Formal marriage articles to which the parties were the intended husband and wife, his father and mother, and her father whereby his father agreed to devise property to him equally with his other children will be ordered specifically enforced upon a bill in equity brought by the husband after his fathers' death, against the trustee under the latter's will, (three judges dissenting), *Phalen v. U. S. Trust Co.*, 186 N. Y. 178, 78 N. E. 943. Where an old lady, a widow, who had built four houses on a lot, in one of which she lived, wrote to her niece in another city, "I wish you to remember what I told you last summer, that the three lots in this half block—are to be yours if you survive me, and I will deed them to you if you will come and live here and care for me.—It includes this nice house" the niece, having accepted the proposal by letter and having lived with and cared for her aunt until she died, was entitled to specific performance of the contract by a conveyance to her of the property, *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582. For a valuable consideration A agreed to devise a farm to B, and he lived on the property until his death with his daughter, who, knowing of the agreement to devise to B at a fixed price, accepted a deed from A "in consideration of love and affection and \$5.00". The contract to convey was binding after A's death as B had repeatedly refused to give up his right to purchase the farm and A had acknowledged the contract. A decree of specific performance was entered for B and A's daughter was not allowed to prove a prior contract to convey the farm to her as it was not recited in the deed to her from A, *Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938.

Oral. An oral contract to devise land, if possession is not taken and no improvements made will not be enforced though a consideration has passed, *Grindling v. Rehyl*, (Mich. 1907) 113 N. W. 290. An oral agreement to devise land in return for the abandonment by another person of a lucrative employment and entry into the promisor's service is within the statute of frauds and unenforceable, but upon a quantum meruit against the personal representative of the deceased the reasonable value of the services rendered can be recovered, *Goodloe v. Goodloe*, 116 Tenn. 252, 92 S. W. 767. Evidence was examined and held to show that an old man entered into a fair oral contract with a woman by the terms of which she agreed to take care of him during the remainder of his life and in

return he agreed to convey to her in his will his homestead and certain other personal property. As she faithfully performed her agreement until his death she is entitled to specific performance although the contract was oral, *Berg v. Moreau*, 199 Mo. 416, 97 S. W. 901. Where a child unmarried and of age agrees to remain with and serve her father till his death in consideration of which he agrees that at his death he will devise her one-fourth of his property, marries and voluntarily left his home 15 months before his death, without coercion on the part of the testator, or those who acted for him no claim can be made for a partial performance, *Tussey v. Owen*, 139 N. C. 457, 52 S. E. 128. A deceased person who desired to dispose of her real estate in equal portions to plaintiff and defendant was persuaded by the latter not to do so, she relying on his making a will in favor of plaintiff in case he should survive her and on a note which she and defendant executed jointly payable after her demise out of her estate. Held—these facts entitled plaintiff to a decree for a conveyance of a half interest in land, or if the land had been conveyed then to a decree that a trust be imposed upon the funds which had come into possession of defendant as administrator, *Tyler v. Stitt*, (Wis. 1907) 112 N. W. 1091.

Sec. 639. Revocation—Of joint will. The will of an unmarried person is revoked by subsequent marriage, *Ore. Laws 1907 Ch. 186*. Where a testator bequeathed the residue of his estate to A and later added a codicil bequeathing the residue to B, the bequest concerning the residue to A, was void, *Logan v. Cassidy*, 71 S. C. 175, 50 S. E. 794. Testator made a will signed by two witnesses, (valid under the laws of Texas,) revoking all previous wills; but, as the testator had previously made a will in Georgia signed by three witnesses and as according to Civ. Code 1895 s. 3341, 3342, a will revoking another must be attested and executed by the same formalities, and three witnesses being the requisite number, the Texas will was invalid concerning property in Georgia, *Castens v. Murray*, 122 Ga. 396, 50 S. E. 131. Where a woman made a will leaving everything to her grandchild but destroyed it because she thought she must leave her children a dollar in order to cut them off but died before she could execute a new will so providing, she died intestate, *In re Emernecker's Estate*, (Penn. 1907), 67 Atl. 701.

Joint will. When a husband and wife make a single disposition of their property by one will, each owning separate property, it may be revoked by either party even after the death of one of them, *Buchanan v. Anderson*, 70 S. C. 454, 50 S. E. 12. Where an aged and infirm couple, each owning property, made a mutual or joint will for the purpose of disposing of and distributing their property equitably among their children after their death, the provisions of the will were reciprocal, and but for these mutual bequests the parties would, in all probability, have made separate wills, it was held that the husband who survived his wife and accepted the provisions of the will as to him could not revoke it nor make voluntary conveyances of the property contrary to its terms, *Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347.

Sec. 640. Probate and recording.

Probate. Wills of persons absent for 5 years may be probated upon proper proof of absence, Ind. Laws 1907, Ch. 31. Probate of a will is made conclusive evidence of its formal execution after seven years by N. J. Laws 1906, Ch. 162. When a will is probated in common form anyone interested adversely to the will may require proof within seven years of the time of probate and he may file a caveat, *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583. Laws 1904, art. 93, §§318, 341 relating to the filing of a petition for the examination of a will probated without contest was construed, *Home of the Aged v. Bantz*, (Md. 1907), 66 Atl. 701.

A will was probated in California and under code Civ. Proc. ss. 2352, 2350, it could not be contested on the ground that the testator did not possess sufficient testamentary capacity when it was filed for probate subsequently in a county of Montana where the testator owned real estate, *State ex rel Ruef v. District Court*, 34 Mont. 96, 85 Pac. 866.

When one of the heirs agrees to allow a will attested by only two witnesses to be admitted to probate on the consideration that after the expiration of the life tenancy the other heirs would convey to him a share in the property equal to their own shares, he has a cause for an action as the will was void in its entirety, the judgment of the probate court having no effect, *Fortner v. Wiggins*, 121 Ga. 26, 48 S. E. 694.

Wills Act 1903, s. 25, was construed to render a service by publication valid when a petition has been filed stating that

the other heirs cannot be found in this State and that "they reside at present in California", *Whitney v. Harington*, 36 Colo. 407, 85 Pac. 84. Tennessee Acts 1874, c. 10, section 6 making the probate of a will in a county court sufficient evidence of the devise of real estate construed together with Shannon's Tennessee Code Section 3914-16 as to the proof of wills by copy, and Tennessee Acts 1875 p. 4, c. 2 allowing aliens to acquire, hold and dispose of real estate and repealing prior statutes as to escheat, *Kiernan v. Casey*, 116 Tenn. 245, 93 S. W. 576. The General Assembly of North Carolina 1885, Priv. Laws, p. 892, c. 52, passed an act to cure the defects in the probate in Tennessee of the will of John Strother dated Nov. 22. 1816, and to ratify and validate the orders of the probate Courts of North Carolina in regard thereto. This act was valid and effectual for the purpose for which it was enacted, *Vanderbilt v. Johnson*, 141 North Carolina 370, 54 S. E. 298.

Recording. Hurd's Illinois Rev. St. 1905, p. 2052, section 9, as to the recording of wills executed under the laws of any of the United States affecting the title to Illinois land, construed, *Catholic University of America v. Boyd*, 227 Ill. 281, 81 N. E. 363.

Sec. 641. Practice—Parties—Appeal. In a will contest where the issue is whether or not the testator left a will the proponents have the burden of establishing the will and until it be established the inchoate right to curtesy of the husbands of the testator's nieces gives them a sufficient marital interest to entitle them to testify, *Roberts v. Bartlett*, 190 Mo. 680, 89 S. W. 858.

Although the plaintiff waited for 28 years before bringing suit for a share under the will of the testator, she was not barred by laches when her guardian and trustee repeatedly promised her an accounting for her interest, and on that account she had deferred suit, *Holzer v. Thomas*, 69 N. J. Eq. 515, 61 Atl. 154.

Appeal. A will contest involving the validity of a will under which land in Illinois passed in a manner different than it would have if the testatrix had died intestate, involved a freehold and an appeal should have been prosecuted direct to the Supreme Court, *Gottmanshausen v. Wolfing*, 224 Ill. 270, 79 N. E. 611.

Parties. When the testator's daughter died after he did her surviving son became a party in interest who could contest the probate of his will, *Henry v. Wert*, (Ala. 1906) 42 S. 405. It was held that a purchaser from an administratrix with the will annexed who accepted her deed and paid as purchase money \$500. and gave a deed of trust for the balance, could not maintain a suit to construe the will of the testator, *Clark v. Carter*, 200 Mo. 515, 98 S. W. 524.

Sec. 642. Construction—What passes by—Description of property—Mistakes in. A devise to the wife of testators of "the use of my farm, consisting of about 95 acres situated in Fillmore county, during her lifetime" is valid and may be made definite by extrinsic evidence, *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958. The word "effects" in a will refers primarily to personalty and unless the context clearly shows that it was so intended will not apply to a homestead, *Andrews v. Applegate*, 223 Ill. 535, 79 N. E. 176.

A testator disposes of all his personal property by will, devising a single piece of real estate to one of his heirs; although owning several other tracts of land no mention whatever is made of them. The presumption is that it was the intention of the testator that such other tracts should descend according to the statute, *Coberly v. Earle*, (W. Va. 1906), 54 S. E. 336. Where the first section of a will reads as follows: "I have already transferred to my wife—by absolute deed for life, remainder to my and our daughter,—in fee simple the grounds and buildings composing my livery stable property in Bloomington, Ill., as the full share of my said daughter—in my estate,—Now it is my will that she, my said wife, shall have and take her life interest in said real estate and her absolute title to said personal property as evidenced by said deeds of transfer, as and for her full share, interest, and dower in my estate, and that our said daughter,—, shall have and take her said residuary interest in said real estate as her full share in my estate, the real estate described passed under the will there having been in fact no deeds executed by the testator, *Lander v. Lander*, 217 Ill. 289, 75 N. E. 487.

Mistake in description.

Mistake in description of land by deed, see *ante*, §§ 79, 490.

A devise described a lot of land as 120 feet of lot 13 of

M. Subdivision, Lot 13 was officially but 108 feet deep but was generally understood to be 141 feet. Testatrix owned 120 feet. Held—the devise carried 120 feet, *Lewis v. Sherwin Bros.*, 129 Ia. 682, 104 N. W. 511. Where a testator only owned the “west” half of the northwest quarter in a certain section, township, range, and county and intended to devise it but by mistake the description in the will read the “north” half, the word “north” will be stricken out and the will thus construed to convey what he actually owned, *Douglas v. Bolinger*, 228 Ill. 23, 81 N. E. 787. Where a testator owning no land in section 24, made a devise of land therein, parol evidence is not admissible to show that he intended to say section 14, in which he owned a tract which contained the exact number of acres stated in the will, and there was no other tract of that size in that township, *Lomax v. Lomax*, 218 Ill. 629, 75 N. E. 1076. When a will purported to devise the testator’s “Kansas City property on Olive Street, No. 705 and 1489” and it appeared that the testator owned only numbers 1705 and 1914 on that street or anywhere else in Kansas City, Missouri, it was held that the particular description could be rejected and the devisee takes the Olive Street property actually owned by the testator, *Board of Trustees v. May*, 201 Mo. 360, 99 S. W. 1093.

Sec. 643. Estates created.

As to estate created see further *ante*, §§ 141-150.

Heirs. It was held that there was nothing in the case to take it out of the general rule that “a bequest or devise, to the heirs at law of a testator or of a life tenant, will be construed as referring to those who are such at the decease of the testator, or of the life tenant, unless a different intent is plainly manifested in the will, *Gardner v. Skinner*, 195 Mass. 164, 80 N. E. 825.

Fee. A devise to the testator’s wife “for the purpose of maintaining herself and our children, to her and her heirs, forever” gave her a fee simple, *Pitts v. Milton*, 192 Mass. 88 77 N. E. 1028. When a will devised all the estate to the testator’s wife in fee simple and in a later clause stated that the testator recommended to his wife certain persons, “believing them to be the proper individuals to inherit under existing circumstances the principal part of my estate”, the widow took an absolute fee, *Goslee’s Admr. v. Goslee’s Exr.* (Ky.

1906) 94 S. W. 638. Where a will read as follows, after giving certain specific bequests: "All the balance of my belongings to belong to my wife—to be for her disposal and use," it was held that the wife took not a mere life estate but a fee simple, *Lee v. Moore's Ex.*, (Ky. 1906) 93 S. W. 911. When a will devised all the property of testatrix to her two grandchildren equally, in case of the death of either of them without descendants the survivor to take the share of the deceased, and upon the death of the survivor without descendants one-half to go to A and the other half to B, the granddaughters took a fee simple with power to use and dispose of it as they saw fit and there was a devise over of only so much as might be left in the hands of the survivor upon the death of both without issue, *Irvine v. Putnam*, (Ky. 1905) 89 S. W. 520. When a testator in his will gave to his wife "thirty thousand dollars in such property as she may select—either real or personal, to do with as she pleases during her life," and in a subsequent clause provided that her thirty thousand should "be valued and set apart to her by three suitable disinterested persons as commissioners appointed by the Fayette County Court", but in a codicil changed her devise to "twenty thousand dollars, to be made up of such real and personal property as she may elect, to be valued and set apart to her as provided" in the will; it was held that the codicil being the governing clause she took an estate in fee simple although under the will alone she would only have received a life estate. As a court of general equity jurisdiction has ample power to do what the commissioners might have done the chancellor could allow her own unguided election to take twenty thousand dollars worth of real estate, *Hartring's Exr. v. Milward's Exr.*, (Ky. 1905) 90 S. W. 260.

Fee—Use of word liens. Where the residue of property passing under a will was to be divided equally among "A's heirs, M's heirs, C's heirs, L's heirs, E's heirs, and B's heirs" and it appeared that M, C, E and B, who were near relations of the testatrix, were living at her decease it was held that "or" had been omitted by mistake between their names and the word "heirs" and was therefore supplied, *Edmonds v. Edmonds Devisees* (Ky. 1907) 102 S. W. 311. A will granted to the widow "during her natural life and at her disposal all the rest, residue and remainder of my real and personal estate". It was construed liberally as granting the estate in

fee simple, *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649. A devise to a wife of a farm, subject to the payment of legacies, and all the residue of the estate "to have and to hold the same forever" with the further limitation—"It is my wish that my said wife will so arrange her affairs that whatever property may be left at her death the same will be divided as near equally as possible between my daughters", under the Rev. Stat. 1898, sec. 2206 and 2278, dispensing with the necessity of words of inheritance to give a fee gives the wife an absolute estate, *Conlin v. Sowards*, 129 Wis. 320, 109 N. W. 91. A devised land to B with the provision that he should not sell or incumber the land in any way, but that he might have power to devise it by will to anyone he saw fit, but this did not come within the provisions of the Act 3, Gen. St., p. 3486, providing that the omission of the words "heirs and assigns" should not prevent the passing of an estate in fee simple, as this was evidently a life estate and the deviser had no intention of making it absolute, *Morris v. Le Bel*, (N. J. Eq. 1906) 63 Atl. 501.

Qualified or defeasible fee. A devise to a son of a farm on condition that he pay \$5,000 to his sister within one year of his mother's death, with a provision that in case of the son's death without issue it should go to grandchildren of testator, gives the daughter a lien on the farm and the son a qualified fee, *In re Korn's Will*, 128 Wis. 428, 107 Wis. 659. When a will read as follows: "I devise to my son D. H. S. during his natural life in trust for the support of himself, wife, and children living with him, my farm—at the death of my said son, the said lands devised to him in trust, is to go to his descendants. In the event that any of the children of my said son die before they are 21 years of age without leaving issue living at the time of their death, then their portion—is to go to the surviving brothers and sisters and the children, if any, of those that may be dead": and D. H. S. had only one child, a son, Isaac, who dies before his father leaving no issue, it was held that the son Isaac took a defeasible fee in remainder subject to be divested in part by the advent of children born to his father thereafter. At his death the title thus held by him went to his father and mother by inheritance. No children thereafter being born to D. H. S., the defeasible fee became absolute, and whatever interest he had in it passed under his will to his widow, *Gilman v. Stone*, (Ky. 1906) 94 S. W. 28.

Life estate. A will giving the testator's wife "all of my place,—also all of my stock that I may have at my demise after her demise to go to" another person and her heirs, gave only a life estate, *Montgomery v. McPherson*, 86 Miss. 4, 38 S. 196. A devise to a wife "to have and to hold as long as she remains my widow; but if she shall marry again, I request and direct that she sell said lot and divide the proceeds of such sale equally between herself and my sons" gives her a life estate and provides for a devise over, *Peck v. Griffis*, 148 Mich. 682, 112 N. W. 772. Where a will devising to four persons "share and share alike" directing that the share due one of the four "be invested by my executors for his benefit during his natural life and for the benefit of his wife and his issue after his death" the latter clause cut the devisee's estate from a fee down to an equitable life estate, *Mee v. Gordon*, 187 N. Y. 400, 80 N. E. 353. A testator devised to his wife all his real estate and personal property, appointed her executrix during widowhood; but in case of remarriage "then her authority must cease and all my real estate and personal property must be sold", "and I make the following bequests", etc.: Held, that the wife took a life estate and that the bequests were not conditioned only on the remarriage of the wife but also became operative upon her death, and there was no intestacy, *Joyce v. Bode*, 74 S. C. 164, 54 S. E. 239.

The rule in Shelley's case. Following the rule in *Shelley's case*, if one devises land in trust to his son in these words, "and if he ever marries and has a lawful heir, they are to have this land"; the devisee owns the whole fee in the land, *Ex parte, Cooper*, 136 N. C. 130, 48 S. E. 581. The testatrix devised her real estate to the devisee for life and to the heirs of her body, but "if she or her heirs died without issue, then over to the Board of Home Missions". By the rule in *Shelley's case* and the act of 1855 this became an estate in fee simple so a deed executed by the devisee conveyed a valid title, *Hastings v. Engle*, (Pa. 1907) 66 Atl. 761. Under the rule in *Shelley's case* a bequest to a grandson "during the term of his natural life then to the lawful heirs of his body in fee simple" or "to his right heirs in fee," grants a fee to the grandson, *Tyson v. Sinclair*, 138 N. C. 23, 50 S. E. 450.

Vested remainder. Where a testatrix devised her property to her children, share and share alike "for the purpose of providing for my husband—during his life", the husband had

such an interest therein as might be subjected to the payment of his debts, *Ratliff's Ex'rs. v. Commonwealth*, 31 Ky. Law Rep. 154, 101 S. W. 978. A will bequeaths "the residue of my real estate to my beloved nephew upon his becoming 21 years of age," and lends it to her sister, including personal property, until her nephew became 21. This was a vested remainder and the estate descended on the nephew's death before he became of age to his heirs, or next of kin, *Hooker v. Bryan*, 140 N. C. 402, 53 S. E. 130. When a will devised to the testator's wife the whole estate to be enjoyed, used and controlled by her with the power of sale during her life but provided that upon her death the undisposed of residuum should go to his children, the latter took such a vested interest as could be sold to pay their debts, *Pedigo's Ex. v. Botts*, (Ky. 1905) 89 S. W. 164. Where a testator gave a remainder to the issue of his children upon two alternatives, first, the death of his children, respectively, without leaving any surviving husband or wife; and second, upon the death of any surviving husband or the death or remarriage of any surviving widow, although the remainder limited upon the latter event would be void within the rule against perpetuities the remainder under the former alternative is valid. A limitation to the heirs at law of a deceased child vested upon the decease of such child although subject to be postponed as to enjoyment until the termination of the life estate given the husband or wife, *Gray v. Whittemore*, 192 Mass. 367, 78 N. E. 422. A will provided that real estate should go to the widow for life and the remainder to her stepson if he lived, otherwise to be equally divided among all the testator's brothers and sisters, and "in case of the decease of either or any of them their several portions shall descend to their children." It was evidently the testator's intention to benefit all of his brothers and sisters and the court construed the will as being a grant to the brothers and sisters, or the children of deceased brothers and sister, or the heirs at law, and their estate became vested at the happening of the contingency, so a brother who sold his interest to another brother had a transmissible interest although he had no children and even though he died before the death of his stepson, *Dilts v. Clayhaunce*, 70 N. J. Eq. 10, 62 Atl. 672. A will which gave a life estate to the testator's wife and after her death a life estate to his daughter and "on the death of both my said wife and daughter. I give the land

to my son it absolutely, or in case he should die before that time, to his legal heirs-at-law, to be distributed among them as if it were intestate property" gave the son a vested remainder in fee, the attempted gift over being void as a perpetuity, *Cody v. Staples*, (Conn. 1907) 67 Atl. 1. The testator provided that "each of my daughters if they shall marry are to take their respective distributive portions in the same way of personal property on their marriage" and another clause devised all his real estate "for the benefit of my daughters," and directed that it be sold on the death or marriage of all and divided up among them. The will was construed to grant a vested interest in both real and personal estate so that the legal heirs of all the daughters when they died unmarried were entitled to their distributive share, *Noble v. Birnie's Trustee*, (Md. 1907) 65 Atl. 823. Under a will providing that upon the death of the testator's wife after the decease of the testator that the "real estate shall descend and go to my two sons—in equal proportions, each taking share and share alike, and if either of them shall be deceased leaving children surviving them, then such child or children shall inherit all their father's interest in my real estate, and in case either of my sons being deceased and leaving no child or children living, then the surviving son shall inherit all my real estate at the death of my wife," the sons took a vested remainder at the testator's death, the enjoyment of which was postponed until the wife's death, *Campbell v. Bradford*, 166 Ind. 451, 77 N. E. 849. Where a will provided that "after my just debts are paid—I—devise all of my property of whatsoever nature, whether real, personal or mixed, to my wife and my sons, who are also hereinafter appointed executors; and in case of the death of either of them, to the survivor in trust for themselves, as heirs of mine and the other three heirs, my son P., my daughters R. H. and T. A., giving them (the executors) or survivor, full power and authority to make distribution of my property among my heirs, as to them may appear best, and to distribute to those of my said heirs who are the most in want in the same manner as I could do, were I living": and it further appeared that the will was drawn during the Civil War when the testator's debts were large it was held that the testator's children took a vested interest which upon their death descended to their children but during the administration and trusteeship period the executors and trustees were possessed

of a discretion to discriminate between children in paying over proceeds of the estate for their various necessities, *Albert v. Sanford*, 201 Mo. 117, 99 S. W. 1068. Where a testator devised lands in trust for his daughters for life, remainder to their children or issue and provided that at the death of a daughter the trustees should convey her share to her children or descendants, upon the death of a daughter leaving a daughter surviving her the share of the daughter vested at once in the testator's grandchild without conveyance by the trustee and the grandchild's husband was entitled to curtesy therein, *Potts v. Shirley*, (Ky. 1906) 90 S. W. 590.

Contingent remainder. A will devised property to trustees to pay the income to testator's children, and upon the death of each to their children or descendants. Held, the interest of a grandchild, whose parent was dead, was contingent and on her death did not pass to her husband, *Twaites v. Waller*, 133 Ia. 84, 110 N. W. 279. A will granted a life estate to A, and in fee to her children, but with a bequest to B in case of death without heirs, and it thus granted a fee to B, with contingent remainder in the children in case they survived the life tenants, but the contingent remainder would not be lost even if the fee and the life estate were to come into the hands of one person, as the life estate technically would not merge with the fee if contrary to the intention of the parties, *McCreary v. Coggeshall*, 74 S. C. 42, 53 S. E. 978.

Equitable interests. After a conveyance to a daughter "during her natural life, then to her children and in trust to her husband" the remainder is equitable and not legal as the title vests in the trustee and a sale by him conveys a valid title as both he and the remainder-men are barred from bringing suit, *Johnson v. Cook*, 122 Ga. 524, 50 S. E. 367. The testator granted an estate for life to his daughter A and her husband, with the right to the survivor to name those of their descendants who should hold the title in fee simple. The property reverted to the testator's own estate when there were no children, and a clause in his will—"Whereas I have heretofore advanced to my daughter A and her husband the property described by deed," etc., and excluding her from any further share in his estate except on an equitable basis, did not operate to grant the property in fee, changing over the trust deed into a grant of absolute title, and therefore a devise by A of this property was void, and it vested in the heirs of the grantor

on the death of his daughter, *Thom v. Thom*, 101 Md. 444, 61 Atl. 193. A devise to S "in trust and confidence, nevertheless that he the said S shall keep (it) invested, and upon time to time, as he shall deem expedient, pay over the net income thereof to R," gave R merely an equitable life estate and upon his death the property descended to the heirs of the testatrix as undevise estate, *Stearns v. Stearns*, 192 Mass. 144 (77 N. E. 1154).

Sec. 644. Devise to several—Shares or portions—Taking per stirpes or per capita—Children.

Shares or portions in general. Under a devise to the testator's wife "and all her children" the widow and the children take as tenants in common, *Kyte v. Kyte*, (N. J. 1907) 67 Atl. 933. When a testatrix divided the residue equally among her six nieces and nephews and further provided that the portions of three "shall at their death revert to their respective children" and if a fourth "should die without child, her portion shall go to" the child of one of the other nieces, the three took only life estates, with remainder to their respective children, while the fourth took a defeasible fee subject only to death without issue, *Powell v. Cosby*, (Ky. 1905) 89 S. W. 721. A testator devised the residue of his estate to be divided into three parts, one to his nieces A and B to be divided so that A should have two-thirds and B one-third; if B's son should not survive testator then her one-third to A: one part to his niece C, and one part to his sister D for life and upon her decease or in case she did not survive testator to her daughters: one part to his nephew E to be paid to him on the death of his mother. Held, A and B should have one-third of the estate, in the proportions specified; C, one-third; D, one-sixth for life and on her death, her daughter; E, one-sixth, the income for life, the principal on the death of his mother, *In re Bouck's Will*, (Wis. 1908) 111 N. W. 573. A will giving the wife of testator a life interest in real estate, then equal division among children, provided, in case of death of any child before that of testator or of his wife, that the children of the deceased child should inherit. The interest of a son living after testator but dying intestate before the mother, the life tenant, was divided, one-half going to the widow and the remainder was equally distributed between the brothers and sisters, *Wicker v. Wicker*, 70 S. C. 33, 49 S. E. 10. A testator directed that

real estate be sold and the proceeds divided into six shares, one for each of his children, the shares of three to be held in trust and of the other three to be paid over to them, respectively, and the will then contained the following clause: "In the event of the death of any of my children before the conveyance and payment to him of the share of my estate herein given to him, or of either of my children whose share of my estate is held in trust, that my executors convey, pay and assign the share of the one so dying to his or her issue absolutely" with a provision that in case of failure of issue the share go to the surviving children of the testator. It was held that after the testator's death a son having died, leaving a daughter whom he disinherited in his will the proceeds of her grandfather's real estate sold by the executors after her father's death went to her, rather than to her father's legatee (3 Judges dissenting), *March v. March*, 186 N. Y. 99, 78 N. E. 704.

Per stirpes or per capita. Under a gift of the residue "to the persons who at my decease are my heirs at law, such heirs at law to share equally," they took per stirpes, *Allen v. Boardman*, 193 Mass. 284, 79 N. E. 260. When a gift is to the children of several persons or to several persons and the children of another person, they take per capita but where it is to several persons or their children, the children take per stirpes; the gift to them being substitutional, *Guild v. Allen*, (R. I. 1907), 67 Atl. 855. Where a testatrix devised to a grandson for life and if he died without issue one-half to E. H. and the other to be equally divided between C, and if she be dead, her children, and the child or children of G, in fee, C's children and G take per stirpes, not per capita, *Van Houten v. Hall*, (N. J. 1907), 67 Atl. 1052. If a will devises a life estate to the mother and the remainder "shall be equally divided between all my children share and share alike, the representatives of such as may have died to stand in the place of their ancestors," the husband of one of the daughters does not inherit, although he is her sole representative and beneficiary by her will, *Bowen v. Hackney*, 136 N. C. 187, 48 S. E. 633. The testator devised land to his daughters, A and B, as a life estate to be held by one on the death of the other, and "the child or children of the deceased parent taking the share to which his or her parent would have been entitled if living." On the termination of the life estate the children living at the time of the death of the testator took per capita, but a share belonging to a deceased

heir passed to his children, and his grantee did not obtain it, *Brantley v. Bittle*, 72 S. C. 179, 51 S. E. 561. The testator devised one-third of the annual profits on his estate to his wife for life with the remaining two-thirds to his children for life and after their death to be divided among the issue of their children, and when in other parts of the will the terms "issue" and "children" were used interchangeably, the term "issue" should be construed as "children" and the residue divided among the grandchildren per capita, *Ducketts Estate*, in re, 214 Pa. 362, 63 Atl. 830. Under a clause in a will reading as follows: "Upon the decease of each of my said daughters—, after the decease of my wife, my Trustees hereunder shall pay over a proportion of the principal of said trust fund,—, for their benefit, equal to the proportion of the income thereof which such daughter so dying shall at her decease be entitled to receive, to her lawful issue, share and share alike, and in case of either or both dying without such issue living at her decease. then to my then heirs at law, in either and all cases to have and to hold to them, their heirs and assigns, to their own use and behoof forever"; it was held that the children of a daughter took per stirpes not per capita, *Coates v. Burton*, 191 Mass. 180, 77 N. E. 311.

Children. When a will devises one-third of the estate equally to three families and the children, the meaning of "children" does not include grandchildren, *Fulghum v. Strickland*, 123 Ga. 258, 51 S. E. 294. Where at the time of the execution of a will devising land to the testator's eight children, specifically named, "and to their children forever" two of the children never had had any children, the word "children" was construed as meaning "heirs" and each child took an undivided one-eighth in fee, *Strawbridge v. Strawbridge*, 220 Ill. 61, 77 N. E. 78. The testator devised property to his three daughters "and their children," and by this will the children and the testator's daughters each received a joint estate and the children did not take per stirpes although one daughter had five children and another three children. The term children is thus used as a word of purchase and not as a term of limitation, *Wills v. Foltz*, 61 W. Va. 262, 56 S. E. 473.

Sec. 645. Children born after date of will or death of testator—Posthumous children.—Mississippi Ann. Code 1892, sections 4489 et seq. as to the rights of children

born after their father makes his will, construed, *Watkins v. Watkins*, 88 Miss. 148, 40 S. 1001. Sec. 9285 Comp. Laws 1897, relative to shares in estates of children born after making of wills, is amended by Mich. Acts 1907 No. 80. Where a will devises "to my daughter E" a share of the estate and says "I hereby give the same to her and her child or children, to be held by them free from the claim or claims of control of her husband," it grants a share not only to the child living at the date of the will but also an equal share in fee to all the other children born to her, *E., Bently v. Ash*, 59 W. Va. 641, 53 S. E. 636.

Posthumous children. Code Sec. 3279, providing that the interest in an estate given to a posthumous child shall be taken ratably from the interests of heirs, devisees and legatees, construed, *McGuire v. Luckey*, 129 Ia. 559, 105 N. W. 1004.

Sec. 646. Devise over of what remains.

Life estate with power—Devise over of what remains. Testator devised to his wife all his estate "during her lifetime" to use "as her own as long as she may live and that she dispose of the same, either principal or interest, as she may choose" with power to dispose of it "as absolutely as she might do were it her own." Held—The wife took a life estate only, *Steiff v. Seibert*, 128 Ia. 746, 105 N. W. 328. I give to my wife all my property; and she "shall have full control of said property during her life and then to be divided as follows:" then follow remainders to the daughters. Held—The wife took a life estate, *Hoeflinger v. Hoeflinger*, 132 Ia. 575, 107 N. W. 312. A devisee of all the property "for and during her natural life and with the privilege of disposing of any or all of said real estate if she should at any time deem it expedient to do so" with a gift over upon her decease, does not take the property absolutely but upon her death any property remaining goes under the will, *Reed v. Reed*, 194 Mass. 216, 80 N. E. 219. Where a devisee for life with the right to dispose of the same as she shall think proper from the time of her death" conveyed to a trustee for her benefit and the latter reconveyed to her in fee she became seized of a fee as the appointee under the power, entitled to damages awarded for a taking for a public use without the interference of a trustee as provided in Mass. Rev. Laws c. 48 sections 17 et seq., *Raymond v. Commonwealth*, 192 Mass. 486, 78 N. E. 514. The testatrix be-

queathed property to her daughter with the proviso that "if my daughter should die before attaining the age of 21 or without disposing of the same or all of it, or without having left a last will and testament, the property should go to A and B." As the daughter could not make a will until she was of age the will should read "if after attaining such age she should die without disposing of the same, etc." In re, Folley's Estate, 70 N. J. Eq. 659, 62 Atl. 553. When a testator gave his widow his entire estate "to be used by her for her comfort and support during her natural life" and in the next clause gave all that "shall remain at the death of my wife" to the testator's children, and it appeared that the net income of the entire estate when the will was made and when the testator died was only about fifty dollars per year, it was held that the widow took a life estate with a power to sell so much as was necessary for her support, *Champney v. Bradford*, (Mass. 1907) 81 N. E. 993. When a residue was left to a wife "whom I desire to be the real owner thereof, and for her only proper use, benefit and behoof during her natural life, or so long as she remains my widow with full permission to her to use and live therefrom as her necessities require, and she to have the full ownership thereof; the same as I now have, and have had during my natural life," and the next clause of the will was as follows "When my wife dies, — whatever then remains of my estate —, if any, be given to my daughter:" the widow does not take a fee simple but may pass a good title in fee during her lifetime, *Allen v. Hirlinger*, (Penn. 1907), 67 Atl. 907. A will which gave the testator's wife "all my estate both real and personal — during life" and in a second clause provided that "at the death of my — wife, whatever may remain of said estates, I give — to my daughter" gave the life tenant a power of sale by implication which when properly exercised divested the remainderman's estate, *Young v. Hillier*, (Me. 1907) 67 Atl. 571. The testator devises his property absolutely to his wife, and some 16 years later makes a codicil "Hereby confirming said will" granting the property to his wife "who will have the use and management during her lifetime should she survive my decease, the balance if any to be disposed of as afore mentioned." The wife clearly holds a life estate in the property and the words devising "the balance if any" give to the testator's wife the power of disposing of the property given to her during her lifetime, and all the prop-

erty remaining not disposed of should go to the testator's heirs at law at her death, *Williams v. Dearborn*, 101 Me. 506, 64 Atl. 851. The testator provided for a life estate for his wife and parents in portions of his property and then he devised all of it to A "and at his death what remains to his children equally, my intention being that after the death of my wife, and my father and mother, that my brother should receive all that remains and after him his children." The words "what remains" did not bequeath an absolute estate to the brother with unlimited power of disposal, but his children were entitled to receive as much as their father received as he was only entitled to its use for life, as it was the clear desire of the testator that his brother's children should have the property at his brother's death, *Tooker v. Tooker*, (N. J. Eq. 1906) 64 Atl. 806.

Limitation on fee—Devise over of what remains. A devise to a wife with a provision that whatever is left at her death shall go to certain persons named gives her an absolute fee, *Killefer v. Bassett*, 146 Mich. 1, 109 N. W. 21. Where a will gave testator's wife all of his real estate and provided further that "after the decease of my wife—I will that all the real estate—belonging to her at that time" shall "be equally divided between my children," the wife took a fee, there being no trust for the children, (Comstock J. dissenting), *Hume v. McHaffie*, (Ind. 1907) 81 N. E. 117. A devise to testator's wife of property to be hers absolutely, provided, however, that "if at her death any of said property be still hers, then the residue still hers shall go to my, not her, heirs" gives the wife an absolute estate, *Moran v. Moran*, 143 Mich. 322, 106 N. W. 206. When a testatrix gave the residue to her husband "he to have the full use and benefit thereof unconditionally, after him, should any remain I give the same to" certain persons, the husband took a fee and the gift over was void, *Wood In Re*, (R. I. 1907) 67 Atl. 8.

Sec. 647. Devise over on marriage or death without issue.

Devise over on death without issue. A devise to a son for life and "in case of his death" without issue and with a widow surviving then to the widow and nephews contemplates the death of the son after that of the testator and not before, *Chesterfield v. Hoskin*, (Wis. 1907) 113 N. W. 647. When

the decedents had conveyed to their children, reserving a life estate, and providing that in case any one of the children should die without heirs of their bodies the land should revert to their survivors and representatives, the words "die without heirs of their bodies" referred to the happening of the event during the existence of the reserved life estate, *Cosby v. Newby*, 30 Ky. Law Rep. 1375, 101 S. W. 306. A testator bequeathed property to his grandchildren, providing that if "either of my daughter's children should depart this life after marriage without leaving any child or children at the time of his or her death," that his or her share should be equally divided among the surviving grandchildren. This created an estate in fee in a grandchild liable to be divested if after marriage such grandchild should die without leaving any children, *Hill v. Terrell*, 123 Ga. 49, 51 S. E. 81.

Devise over on marriage. A devise to a sister, seventy years old, "so long as she shall remain unmarried" with power to sell at public or private sale, and to invest and reinvest the proceeds and appropriate them to her own use so long as she shall remain unmarried," gave the devisee a life estate, *Harlow v. Bailey*, 189 Mass. 208, 75 N. E. 259. Under a devise to the testator's widow and her heirs and assigns forever, "so long as she remains my widow," the devisee never having remarried died seized of an estate in fee simple, *Scott v. Murray*, (Penn. 1907) 67 Atl. 47. A devise to the wife of property "to be enjoyed by her" until her marriage, in which case the daughter should have it for life, and, after her, her issue, gives the wife a life estate terminable on her marriage, the daughter a life estate after the marriage of the widow, and the children a vested remainder in fee, *Haab v. Schneberger*, 147 Mich. 583, 111 N. W. 185. Where a testator devised to his son, Elias, and then provided that "if he and his wife should have no children together and Elias should die before his wife she shall be entitled to one-third part of the proceedings of said farm, so long as she remains his widow, but if she should marry another man, her interest must cease in the premises from and after said marriage," the son took a fee simple although he had no children by his wife, *Boehm v. Baldwin*, 59 Ill. 221, 77 N. E. 454. A testator devised her entire estate to her daughter, providing that if she should die before reaching the age of 18 the property should go to others; but that if she should marry before reaching

that age she should become entitled to the full control of said property. Held—This was not a mere life estate, but until the daughter reached the age of 18, or sooner married, the estate was determined by her death, *Wheeler v. Long*, 128 Ia. 643, 105 N. W. 161.

When a testator conveyed to trustees "for the sole and separate use of" his "daughter—and the heirs of her body" and provided further that "should my daughter—die without being married, or being married, die without any children" there should be a gift over the daughter took a fee tail which by the Kentucky statute was converted into a fee simple as the trustees under the will held the legal title to the estate, *Watkins v. Pfeiffer*, (Ky. 1906) 92 S. W. 562. It was held that a clause in a will reading as follows: "I give and bequeath to my wife all my real estate for her, and for her and my children's benefit as long as she may live, but she shall not sell or otherwise dispose of my real estate, but only enjoy the benefit thereof during her lifetime,—but in case my wife should marry again, she shall only have the benefit of my real estate what the law allows her, say one-third" followed by the following clause "after the death of my wife, all my real estate or other property what may be left, shall be equally divided between my then living children, or to their heirs," gave the widow a life estate for herself and children but upon her remarriage two-thirds vested in fee in the children with a vested remainder in them as to the other third, *Weyler v. Weyler*, (Ky. 1907) 99 S. W. 222.

Sec. 648. Devise to a class—When estate to be divided.

Devise to a class. When a bequest is given to A and her children it is a bequest to a class, and if the children die A takes the whole of the bequest, *Davis v. Sanders*, 123 Ga. 177, 51 S. E. 298. The testator devised his property equally to his children, and the children in esse at the death of the testator took vested interests as the devise was to the children as a class, *Irvin v. Porterfield*, 126 Ga. 729, 55 S. E. 946. A deed in trust for the use of the testator's wife during her natural life and his children A, B, C, & D, "and any future children I may have by said wife," providing that the property was to be used as a home for the widow and children, grants an estate for life in the wife with a fee in remainder to the children as a class. A son of the testator, E, born after the

execution of the will would have an equal right to a share in the remainder after the death of the mother, but he could not bring suit for his share until then, although the other heirs and the widow sold the estate without allowing him a share; but he might in equity be entitled to bring proceedings for compensation, for the loss of the use of the home, *Stiles v. Cummings*, 122 Ga. 635, 50 S. E. 484. A devise of a certain tract to "Sidney Payne Clay, as trustee, the fee simple—upon the following trust, to wit; that he permit my son, Cassius Marcellus Clay, to use, occupy and enjoy said tract of land during his natural life, and at his death to convey said estate to his children. But should my son, Cassius die without issue, the land shall be conveyed to my son, Brutus, if living," gave the legal title to Sidney Payne Clay; the life estate, or use, to Cassius Marcellus Clay, and the equitable fee vested in the children of the latter as they came into being subject to be divested, however, upon their death before that of their father, the life tenant. Where, however, during the life of Cassius Marcus Clay, all six of his children joined in an indenture conveying to each other his, or her, one-sixth interest, "so that each shall hold his or her undivided sixth in said remainder—free of all rights or claims or contingencies of the other five parties," each child surviving the father was estopped from claiming any interest in the one-sixth interest conveyed by one of their number after such indenture, based on the ground that such child thereafter died before the father, *Clay v. Chenault*, (Ky. 1906) 96 S. W. 1125.

If by a devise in a will, A was given a share with B and C in the residue of an estate, this devise was not to a class as A, B and C were specifically mentioned, therefore when A died before the death of the testator his share lapsed and went into the residuum, *Kent v. Kent*, 106 Va. 199, 55 S. E. 564. A legacy was given to the testator's grandchildren as a class with a direction that it be paid to them in a certain year, being divided equally among them. Then everyone belonging to the class of grandchildren alive at the time of distribution received an equal share of the estate, *Stoors v. Burgess*, 101 Me. 26, 62 Atl. 730. Where a will provided that the income be paid to the children of testator's deceased son and if any of such children should die without issue the share of the deceased child should go to the survivors and on the death of all such children the principal be distributed among the son's grand-

children, taking by representation and receiving their shares as they come of age, the remainders to the grandchildren, as well as the contingent remainders arising from the death of some of them without issue, vested at the testator's death, subject to be reopened to let in after-born grandchildren, *Minot v. Purrington*, 190 Mass. 336, 77 N. E. 630.

When estate to be divided. A will directing that the interest from testator's property should be paid annually to his sons for life and after their deaths the principal to go to their living children at the age of 21 should be construed as giving the principal of the fund to the grandchildren living at the termination of the life estates, the interest to be paid till they become of age and then the principal, *In Re Benner's Will*, (Wis. 1907) 113 N. W. 663. Where a will contains a provision for the support of "one or both of two daughters as long as they remain single or live with their mother" and another clause provides that the property shall be divided on the death of the mother, who is the life tenant, the will is to be construed as a whole, and the support of the daughters is to continue only during the life of the mother, and the property is to be divided on her death among the remaindermen, *Rogers v. Highnote*, 126 Ga. 740, 56 S. E. 93. Where a testatrix provided that upon the death of her trustee all the property then remaining should belong to her children then alive, the child of children of a deceased child taking their parent's share and in the final division of the estate after the children's death each should be accountable for such portion thereof as might have been set apart to such child by the trustee before majority in pursuance of certain powers, upon the purchase by the trustee of a lot for the children, a child of one of the children had no interest whatever therein, *Clisby v. Clisby*, 146 Ala. 687, 40 S. 344.

When a homestead is devised to four children to be held for 21 years after the death of the parents for their use, they may sell if all agree to the sale when the children are of age, *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218.

Sec. 649. Trusts—Creation and termination. "All my property shall be put on interest by some one appointed by the county judge" means that the real estate is to be sold and the proceeds invested and held in trust, *In Re Benner's Will*, (Wis. 1907) 113 N. W. 663. A will provided that the

testator's children, T, M, K and S, "will arrange among themselves the division of my place, our home, Eureka—I want S M's children to have whatever fifteen acres of land will bring well sold. I want (another grandchild) to have whatever five acres—would bring well sold:" the four children were constituted trustees for the purpose. Held,—the grandchildren named were entitled to the proceeds of 20 acres of average land well sold; this was not a legacy but a trust charged upon the whole estate, *Barksdale v. Capital City Realty Co.*, (Miss. 1906) 42 S. 668.

Oral instructions given by a testator to his wife, after making a will devising all his real estate to her held to create a trust in that property as to all income above that necessary for her support, *Smullin v. Wharton*, (Neb. 1906) 106 N. W. 577.

A grant of power to a trustee under a will to enable him to sell the trust property without reporting his transactions to a court and without requiring him to furnish a bond, renders him still within the jurisdiction of a court of equity in case of waste or mismanagement, and a will with these large discretionary powers granted to the trustee is not void, *Keeler v. Lauer*, 73 Kan. 388, 85 Pac. 541.

Precatory words. "When words of recommendation, request, or the like, contained in a will must necessarily be followed in order to carry out the clear purpose of the testator they are to be regarded as words of command or direction," *Wolbert v. Beard*, 128 Wis. 391, 107 N. W. 663. When a testator created a trust by the terms of which "after the decease of my said wife, one half of the principal—is to be paid over and conveyed to such person or persons,—as my said wife shall appoint, but it is my wish and desire that if my wife has received from my daughter and her family the affection and respect to which she is entitled, that she then will appoint said share of my said trust estate to my daughter" such clause merely expressed a hope of the testator, not a trust for the benefit of the daughter, *Holmes v. Dalley*, 192 Mass. 451, 78 N. E. 513.

Termination. Where a will gave the residue to four sons or their survivors as executors to pay from the income annuities to a wife and a daughter and "to divide the whole of what remains of the said net income" among the sons or those alive at the testator's death, the share of each son to cease at

his death and be divided among the surviving sons, and the last surviving child, son or daughter to inherit the whole estate after the wife's death; and a codicil provided that a son's wife should receive one third of his share to be paid when they were apportioned, in consideration of the fact that she otherwise would have no dower therein, the trust terminated upon the death of all the beneficiaries except one son and his wife, not upon such daughter-in-law's death, *Treadwell v. Williams*, (N. H. 1907) 67 Atl. 947. The testator devised his estate to trustees for his sons, and he provided that if his son Henry should die without children or grandchildren that his share should be divided equally between his sons A. B, and D "or such of them as may be then living by their trustees and the trustees for his son Joseph." Although Joseph had died before Henry's share was distributed at his death without children or grandchildren, Joseph's trustees received the share of Henry's estate as the other sons had died and the trustees for them had ceased as their estates vested in their children, *Norris Estate In Re*. (Pa. 1907) 66 Atl. 996.

Where a will devises property to trustees who are to have complete control over it, to pay the income to the son and grandchildren of testatrix during the life of the son and on his death to pay the "principal sum then remaining" to the grandchildren the trust is an active one and may not be dissolved during the life of the son, *Olsen v. Youngerman*, (Ia. 1907) 113 N. W. 938. A will established a trust for ten years, at the end of which time the property was to be divided among the beneficiaries surviving. Held—A beneficiary might not maintain partition before the end of the time specified, *Wicker v. Moore*, (Neb. 1907) 113 N. W. 148.

Sec. 650. Powers contained in wills.

Extent. A devise of the residue equally to two children, "during their natural lives, respectfully, with remainder to their heirs or his or her heirs of their body, but with full power and authority to each of my said children after their majority to dispose of the absolute estate in fee-simple title, and on the death of either the survivor to inherit. But, should both my children die without issue of their body, then and in that event my grandnephew—shall inherit all my property"; gave each son upon coming of age power to mortgage the fee in one undivided one-half of the residue, *Grace v. Perry*, 197 Mo.

550, 95 S. W. 875. Where two sons of the testator took under his will a one-fifth interest "absolutely and without restriction" but in a codicil it was provided that "in case one of my sons dies without children—his portion shall return back to (the testator's) family again," it was held that from a reading of the whole will and codicil together it was apparent that the testator did not intend by the codicil to take away the power he had given his sons to own, use, sell or mortgage the property as they pleased while they lived. The sons therefore could convey a fee simple, *Pennsylvania Land Co. v. Justi*, (Ky. 1906) 90 S. W. 279.

Execution. A power given by will to a devisee for life, or during widowhood, to sell any of the property for the support of the devisee and her children does not authorize her to execute a deed of trust, *Dougherty v. Dougherty*, 204 Mo. 228, 102 S. W. 1099. A deed executed by a life tenant will not be regarded as in pursuance of a power contained in a will where one of the devisees joined in it, the land was sold for one-third of its value, the life tenant did not convey as executrix and the deed contained no reference to the power, *Walters v. Bristow*, 77 Ark. 182, 91 S. W. 305. Where a widow has been granted a life estate in her husband's property and a power of sale, a deed executed by her without reference to the power or instrument creating it was construed as an execution of the power of sale, *Middlebrooks v. Ferguson*, 126 Ga. 232, 55 S. E. 34. An assignment to the "heirs and assigns" of a living person is void as is also a married woman's promise during her husband's life to convey to her son, on request, land owned by her husband. Although her husband under his will gave her power to convey lands to his children her agreement with the son to do so upon request was not a defective execution of a power which equity would help enforce, but a complete nonexecution thereof, *Sayer v. Humphrey*, 216 Ill. 426, 75 N. E. 170. When a testator, in ignorance of the fact that his father who was still alive had given him a special power of appointment, began his own will by declaring that he intended to dispose of all property of which at his death he might be seized or possessed, or over which he might have any power of disposition whatsoever; and after his father's death and when familiar with the power of appointment given him in his father's will, he executed a codicil to his own will, by which he expressly confirmed it, the power of appointment

was well exercised. Although the power was limited to appointment among his father's direct descendants, the donee, the son bequeathed his entire residuary estate in trust to pay one third of the income to his widow for life, and the principal to fall into the other two-thirds which were held in trust for his own children living at his death in equal shares; it was held that the widow should take her income from one-third only of the testator's own estate, while the clause as to income for the children applied both to the father's estate and his own, *Stone v. Forbes*, 189 Mass. 163, 75 N. E. 141.

Appointees. When the testator's widow took a life estate with power to "will or distribute to her relations and to my relations any property, real or personal, as she may choose or desire them to have" in her distribution she was not limited to next of kin, but could give to the children of her own and her husband's brothers and sisters, *Levi v. Fidelity Trust Co.*, (Ky. 1905) 88 S. W. 1083. When the testator's wife was sole legatee and executrix with "full power to dispose of any real estate in the simple or otherwise in as full and large manner in every respect as I could do myself, if living" a conveyance by her of lands to a large creditor of her husband's estate in full settlement of his claim passed a good title, *Kerr v. Long's Ex.*, (Ky. 1905) 88 S. W. 1068.

Estate of appointee. When a daughter who possessed an equitable life estate under her father's will with a power of appointment among her children, attempted to exercise the power under her last will by dividing the land among her children equally for life with a remainder to the living heirs of the body of each, and further provided that each devisee should have a power of appointment among their descendants, it was held that her will "was valid only to the extent that it exercised the appointment allowed by her father's will; that is, in designating which of her children took and in what portions after her own death. But the attempted limitation of their estate to a life estate, with remainder to their children, was void," *Brown v. Columbia Trust Co.*, (Ky. 1906) 97 S. W. 421. Under a will which provides for the sale of the testator's land by the executor as soon as practicable and the proceeds divided among such children "as may be living at the time" the latter took no vested interest until the sale. An order of a county court declaring the estate settled, and discharging the executor does not revoke such a power of sale, *Starr v.*

Willoughby, 218 Ill. 485, 75 N. E. 1029. Under a will devising a homestead to the testator's widow for life and providing that within two years of her death it be sold and the proceeds equally divided among his children, the latter took no vested estate at the death of their father, but only a right to money when the land should be sold. A child's interest, therefore, was not subject to levy and sale as real estate during the widow's life, *Darst v. Swearingen*, 224 Ill. 229, 79 N. E. 635.

Purpose. When a will read as follows "I wish my wife—to have all the rents and proceeds of all my property during her life—and at her death to be distributed to my three nieces" and also provided "I wish the real estate to be managed or sold to the best interest of my wife" the wife had a right to sell land only for her support and maintenance, not at her pleasure, *Offutt v. Beall*, (Ky. 1906) 97 S. W. 1113.

Sale under power ordered by court. The testatrix by her will "authorizes and empowers my executrix—to sell at public or private sale my house, whenever and upon such terms as she may deem best," etc. "The proceeds I direct my executrix to divide among my three daughters." When the property was not sold for three years by the executrix, and was being occupied free of rent by the unmarried daughters according to the terms of the will, the court might direct that the property be sold as it was not within the discretion of the executrix to delay the sale so long without any effort to find a purchaser and as the term of the will expressly directed that a sale be made, *Severns' Estate In Re*, 211 Pa. 68, 60 Atl. 494.

Sec. 651. Conditions. If testator provides in her will that her sons shall be cut off if they marry "common women," the condition is void from uncertainty, *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218. The words "reconciliation and amity" upon the taking place of which a devise was made conditional mean a mental state rather than an active condition of association, *Alexander v. Page*, 30 Ky. Law Rep. 1362, 101 S. W. 346. A will gave a life interest to the widow and \$1,000 on her death if he were alive to a grandson, otherwise to five separate charities, and the residue was left to his nearest heirs by the last clause in the will "if there should be any left after paying the above bequests." As the grandson was alive at the death of the life tenant he received the \$1,000 and also the residue as the bequests to the charitable organizations were not due on

account of his being alive, *Paul v. Philbrick*, 73 N. H. 237, 60 Atl. 682. A devise to a son "in case [he] shall keep, care for and support me during the remainder of my life, as a consideration therefor" is upon a condition precedent of which at least substantial performance must be shown in order to entitle the devisee to the land. Ignorance of the condition is no excuse, *Fisher v. Fisher*, (Neb. 1907) 113 N. W. 1004.

Sec. 652. Restraint on alienation or incumbrance. Where a will created a trust for the payment of income to certain persons for life and upon the death of any one in trust for his children and the issue of any deceased child living at the time of such deceased, "his, her, or their executors, administrators, or assigns," it was held that upon the death of a life tenant the corpus of his share vested absolutely in his issue. The trust was passive and the rule forbidding restraint upon alienation was not, therefore, violated, *Denison v. Denison*, 185 N. Y. 438, 78 N. E. 162. Where a wife bequeathed all her estate to her husband as trustee for her children and further provided that no part thereof shall be encumbered by, or its rents and profits in any way subjected to, the debts of the husband and "should it at any time be held by a court of competent jurisdiction that said rents and profits are liable to be subjected to the debts" of the husband "then—I direct that all interest of my husband in my estate shall instantly cease, and thereafter the rents and profits—shall be paid over to my children," it was held that the latter clause was valid. The husband could have elected not to take under the will but having taken thereunder he is bound by it, *Bottom v. Fultz*, (Ky. 1907) 98 S. W. 1037.

Civ. Code 715, 716 was construed not to prohibit the suspension of the right of alienating property under the provisions of a will which provided that the estate should not be divided until the youngest daughter became 21 years old, if the executrix was only given the right to sell the property without holding the title, *Campbell's Estate*, *Campbell v. Campbell*, 149 Cal. 712, 87 Pac. 573.

Sec. 653. Real estate charged with debts and legacies—Specific devise.

Legacies. The only land the testator owned was charged with the payment of an annuity where the testator had no

personalty in, *Dixon v. Roessler*, 76 S. C. 415, 57 S. E. 203. A legatee has a lien on the real estate where the personal property has been wasted and embezzled and is insufficient to pay his legacy, and he has a right prior to the interest of the remainderman, *Patterson G. H. Ass'n. v. Blauvelt*, (N. J. Ch. 1907) 66 Atl. 1055. Where a will directs the payment of debts out of the personal estate and the real estate is encumbered by the testator subsequent to the execution of his will, the devisee of the real estate may have the encumbrance on the real estate discharged out of the personal estate, to the disappointment of legatees, pecuniary and specific, *French v. Vradenburg's Ex'rs.*, 105 Va. 16, 52 S. E. 695. Where a testator first devised and then conveyed land to two of his sons subject to an annuity to his third son and legacies to his next of kin after the latter's death, and by the residuary clause in his will devised to his daughters the residue of his personal and real estate and directed that each of them should pay his third son a certain sum and set apart out of the personalty another sum the income of which they should pay to the next of kin of the third son after his death, the annuities and legacies to the third son and his next of kin constituted a charge upon the lands devised to the daughters, (3 judges dissenting), *Irwin v. Teller*, 188 N. Y. 25, 80 N. E. 376.

Debts. Ky. St. 1903, section 2084 and following as to the liability of devisees for debts of the testator, construed, *Ferguson v. Worrall*, 31 Ky. Law Rep. 219, 101 S. W. 966. Ky. St. 1903, section 2066, providing that when property is devised subject to the payment by the devisee of a certain sum of money to another the latter shall have a lien on the devise, construed, *Holt's Ex'r v. Deshon*, 31 Ky. Law Rep. 744, 103 S. W. 281.

Specific devise. Where a testator gave land, definitely described, to X, and other land similarly described to his children, and later by codicil revoked the devise to X and gave the properties to his children "together with all the real estate I may hereafter accumulate," and at the time of making the codicil testator had personal property sufficient to pay the general legacies given by the will, the devise to the children of the lands described was a "specific" devise and not chargeable with the payment of the general legacies, under California Civil Code, ss. 1357, 1359, 1360, 1362, *In re Painter's Estate*, (Cal. 1907) 89 Pac. 98.

Sec. 654. Equitable conversion. When the testator's will ordered a conversion of his real estate into personal property it should be treated as personalty in the hands of his executors, *Hardin v. Hassell*, (Tenn. 1907) 100 S. W. 720. After devising land testator entered into a contract for its sale. After his death the vendees made the payments required. Held—the money thus paid should pass into the residue as personalty, *In re Bernhard's Estate*, (Ia. 1907) 112 N. W. 86. Where the testator granted a legacy and devised the balance of his estate to be divided among his eight children, the will operated to convert his real property into personal, if it would be necessary on account of the difficulty of dividing the parcels, to make a sale of the property although such a conversion had not actually been made, and a mortgagee taking a mortgage from one of the heirs on all the heirs' interest in "The Hoover House" would have no lien on the real estate, when it was the evident intention of the testator that a conversion should be made, although it was not expressly stated, *Stake v. Mobley*, 102 Md. 408, 62 Atl. 963. Where in a will realty and personalty are included in a single provision the income going to life tenants and the property to their heirs, the whole will go to those technically described as "heirs" in the absence of any intention shown to treat the two kinds of property differently. Where the trustees are empowered to sell land and change investments, but are not directed to convert land into personalty, the proceeds of real estate are to be treated as real estate in making distribution until the final vesting of the estate in the parties ultimately entitled, *Gray v. Whittemore*, 192 Mass. 367, 78 N. E. 422.

It was held that the following clauses in a will "I give and devise to my wife, during her life, the farm on which we reside—It is my will that all my children shall be made equal in the division of my estate.—After the death of my wife, I will and direct that the farm on which we reside shall be sold by my executor, and the proceeds divided amongst my children": created a case of equitable conversion, and when the testator died the farm was changed from real estate to personal property. Accordingly a daughter of the testator who died prior to his widow took a vested interest in personalty which passed to the daughter's distributees, *Miller's Exr. v. Sageser*, (Ky. 1907) 99 S. W. 913.

No conversion. Where a residuary clause to five persons

in equal shares was followed by this clause: "I—devise all my real and personal estate—to E. the executor—in trust for the payment of my just debts and the legacies—with power to sell and dispose of the same" in his discretion, neither the executor nor an administrator with the will annexed could sue to recover rents and profits of certain real estate from the testator's co-tenant. There was no equitable conversion and the right of action was in the devisees, *Coann v. Culver*, 188 N. Y. 9, 80 N. E. 362. When an analysis of a will showed the following directions of the testator: (1) Personalty and realty given to widow during life, for the joint use of herself and children. (2) Widow authorized to dispose of personalty at discretion. (3) On arrival of age of any child, widow authorized to give said child any property she (the widow) may desire, preserving, however, equality among all the children in the distribution of said estate. (4) Widow empowered to sell any real estate she may think best, with the advice and counsel of her friends. (5) At the death of widow, whatever property there may be "I wish sold and equally divided among my children": there was no equitable conversion of real estate into personalty. In order to work an equitable conversion the direction of the testator must be absolute and imperative, and, if there is any doubt or contingency controlling the exercise of judgment on the part of the executor or trustees, there is no room for the application of this doctrine, *Bennett v. Gallaher*, (Tenn. 1906) 92 S. W. 66.

Sec. 655. Ademption—Cumulative devise. When real estate specifically devised has been conveyed by testator before his death the clause containing that devise must be construed as if there had been no specific devise, *In re Hall's Estate*, 132 Ia. 664, 110 N. W. 148.

Cumulative devises. Where a testator devised to his wife the use for life of the upper part of the house which they occupied as a home and later added a codicil giving her "whatever share of any estate she would be entitled to by law if I left no will," it was held, that, as his estate was considerable and the provision under the will inadequate for her and both will and codicil carefully drawn, the devises were cumulative, *Westgate v. Farris*, 189 Mass. 587, 76 N. E. 223.

Sec. 656. Lapsed devise—Omission of child in will. Kentucky statutes 1903 section 4843 which provides that devises which fail shall not pass into the residue but go as in the case of an intestacy, construed, *May v. Walter's Exrs.*, (Ky. 1906) 97 S. W. 423. If a devise under a will becomes lapsed owing to the death of the devisee before the death of the testator, the property passes into the residue, when there is a provision that the residue shall be sold by the trustee. The land by the doctrine of equitable conversion may be regarded as being converted into personalty, although the actual change is not made, and the settlement of the property effected in that way when all parties consent, *Duckworth v. Jordan*, 138 N. C. 520, 51 S. E. 109. Where three remaindermen to whom an estate had been devised had not been heard from for seven years at the time the will was made or for thirty years when the life tenant died it was conclusive only that they were dead, but the allegation that their heirs were dead also was demurrable, *Furr v. Burns*, 124 Ga. 742, 53 S. E. 201. Where a testator devised to his wife "in lieu of dower, all my real estate—for her sole support during her natural life, after which it shall descend in equal portions to my sons, J— and C— to be theirs forever, and in case either of said sons shall not survive my wife, then the survivor to take all" the will made no provision for the death of a son during the testator's lifetime and a child of such deceased child took under the provision's of *Hurd's Illinois Rev. St. 1905*, c. 39, section 11, *Pirrung v. Pirrung*, 228 Ill. 441, 81 N. E. 1065.

Child not mentioned in will. Under *Mass. Rev. Laws c. 135*, section 19, the question of whether or not the omission of any provision is one of fact to determine which the land court has jurisdiction, *Woodvine v. Dean*, 194 Mass. 40, 79 N. E. 882.

Sec. 657. Survivorship—Accrued shares. In the case of a devise to children for life, and as each child dies leaving issue, a gift of the share of such child to his issue and in default thereof to the surviving children, the latter are, in the absence of a contrary intention, the children who survive the life tenant who thus dies without issue, *Dary v. Grau*, 190 Mass. 482, 77 N. E. 507. A will provided that the survivor of my two daughters being single and unmarried until the time of her death shall have power to dispose of the property ab-

solutely by her last will and testament, and when the unmarried sister did not live longer than the married one the word "other" could not be substituted for "survivor" in the will so as to validate the will of the unmarried daughter disposing of the whole property and there was an intestacy, *Hill v. Safe D. & T. Co. of Baltimore*, 101 Md. 60, 60 Atl. 446.

Accrued shares. Where a life estate is granted by the terms of a will to the widow and the remainder to her children, containing a further provision that if any of the children die before the death of the life tenant that their shares shall be divided among the survivors, the shares are subject to be divided in case of death before the expiration of the life estate, but a part of a deceased child's share does not resurvive when it has been apportioned among one of the other children and he dies, but it goes to his heirs, *Boggs v. Boggs*, 69 N. J. Eq. 497, 60 Atl. 1114. The testatrix by will devised property to be held in trust for the benefit of her grandchildren A, B, C and D for 20 years and to be divided at the end of that time, but if any of the grandchildren died before the expiration of the period of 20 years their share should be paid to their children, but if one died without issue his share should be divided equally among the surviving grandchildren. When A died without issue his share was divided between B, C, and D, and when B died his original quarter share devolved on C and D, and when C died his original quarter share devolved on D, but B's one-third belonging to A did not re-survive to C and D on the death of B, but went to his wife; likewise when C died the one-third of A's share or the one-half of B's share which had devolved on C did not resurvive to D but devolved on B's wife. The property became vested in the devisees on the death of the testatrix subject to the contingencies declared, *Marshall v. Safe Deposit & Trust Co.*, 101 Md. 1, 60 Atl. 476.

Sec. 658. Election.

Widow's election to take statutory rights in husband's property, see *ante*, § 52.

In Ohio a deputy clerk in the probate court has no authority to receive the election of the widow to take under the will of her deceased husband, and an election made before such deputy may, upon application of the party making it, be set aside by a court of equity, *Mellinger v. Mellinger*, 73 Ohio

St. 221, 76 N. E. 615. In Indiana as the law stood in 1872 there must be clear evidence that a widow elected to take as devisee rather than as widow the presumption being that she took in the latter capacity, *O'Brien v. Knotts*, 165 Ind. 308, 75 N. E. 594. A husband devised land belonging to his wife to his granddaughter also providing for his wife in his will. The wife, after his death, before probating the will, conveyed the property by deed of warranty to a purchaser. The title was held good through the election of the wife to claim the land, by title paramount to the will, *Pence v. Life*, 104 Va. 518, 52 S. E. 257. Where a testator devised one lot which he owned in fee to one grandchild and attempted to devise a lot in which he was only a tenant by the curtesy to another grandchild, the devisee of the lot he owned cannot take possession thereof and then claim her proportionate share in the other lot as an heir, *Beetson v. Stoop*, 186 N. Y. 456, 79 N. E. 731. A will devising all the property in trust for the testator's wife and children and authorizing the executor to sell any real estate, including the home in which the family lived, and reinvest the proceeds in another home for them shows an intention to devise the home, so that the children must elect to take under the will or against it. Where it clearly is for the interest of a minor child to take under the will the chancellor will make the election for him, *Bonnie's Guardian v. Haldeman*, (Ky. 1907) 102 S. W. 308. When a will provides that a wife shall receive one-fifth of the estate provided she makes no claim to a half interest in it as community property, the court may allow the widow until the time of distribution to make her final election, although she files a written statement claiming one-half of the estate, as there is a great deal of doubt whether she will get any of the estate as community property. *In re Dunphy's Estate*, *Flood v. Dunphy*, 147 Cal. 106, 81 Pac. 315.

Sec. 659. Conveyance by devisee before probate vacated. A devisee of a fee-simple estate in land can sell it and pass a title to his vendee which will not be defeated by the subsequent vacation of the order of probate of the will. If an heir desires to restrain the power of the devisee to sell, he must prosecute his rights with diligence, and suspend adverse judgment by supersedeas as in other cases, *Geary v. Rumsey*, (Ky. 1906) 97 S. W. 400.

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